No. 96-1693-CFH Title: Frank X. Hopkins, Warden, Petitioner
v.
Randolph K. Reeves

Docketed: April 23, 1997 Court: United States Court of Appeals for the Eighth Circuit

Entry	Date	Proceedings and Orders
	Apr 14 1997	Application (A96-731) for a stay of proceedings pending the filing and disposition of a petition for a writ of certiorari, submitted to Justice Thomas.
	Apr 16 1997	Application (A96-731) denied by Justice Thomas.
	Apr 23 1997	Petition for writ of certiorari filed. (Response due May 23, 1997)
	May 23 1997	Brief of respondent Randolph Reeves in opposition filed.
	May 23 1997	Motion of respondent for leave to proceed in forma pauperis filed.
	May 23 1997	Brief amicus curiae of Arizona filed.
	Jun 3 1997	DISTRIBUTED. June 19, 1997
	Jun 24 1997	Letter received from counsel for the petitioner.
	Jul 2 1997	REDISTRIBUTED. September 29, 1997
	Sep 29 1997	Motion of respondent for leave to proceed in forma pauperis GRANTED.
	Sep 29 1997	Petition GRANTED. limited to Questions 1, 2 and 4 presented by the petition. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 13, 1997. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, December 15, 1997. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, January 5, 1998. Rule 29.2 does not apply. SET FOR ARGUMENT February 23, 1998. **********
	Nov 12 1997	Brief amici curiae of Arizona, et al. filed.
	Nov 13 1997	Joint appendix filed.
	Nov 13 1997	Brief of petitioner Frank X. Hopkins, Warden filed.
	Nov 13 1997	Brief amicus curiae of United States filed.
	Dec 9 1997	Order extending time to file brief of respondent on the merits until December 22, 1997.
	Dec 9 1997	Motion of respondent for appointment of counsel filed.
	Dec 12 1997	Brief amicus curiae of National Association of Criminal Defnese Lawyers filed.
	Dec 22 1997	Brief of respondent Randolph Reeves filed.
	Dec 29 1997	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Dec 30 1997	Application (A97-485) to extend the time to file a reply brief from January 5, 1998 to January 26, 1998, submitted to Justice Thomas.
	Dec 31 1997	Application (A97-485) granted by Justice Thomas extending the time to file until January 19, 1998.
	Jan 5 1998	Record filed.

No. 96-1693-CFH

Entry	Date	Proceedings and Orders
	Jan 7 1998	Record filed.
	Jan 12 1998	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Jan 12 1998	DISTRIBUTED. January 16, 1998 (Page 17)
	Jan 14 1998	CIRCULATED.
	Jan 15 1998	Reply brief of petitioner filed.
	Jan 20 1998	Motion for appointment of counsel GRANTED and it is ordered that Paula Hutchinson, Esq., of Lincoln, Nebraska, is appointed to serve as counsel for the respondent in this case.
	Feb 23 1998	ARGUED.

No. _____

In The

Supreme Court of the United States

October Term 1996

STATE OF NEBRASKA,

Petitioner,

v.

RANDOLPH K. REEVES,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

DON STENBERG
Attorney General

J. KIRK BROWN
Counsel of Record
Assistant Attorney General
P.O. Box 98920
Lincoln, Nebraska 68509-8920
Tel: (402) 471-2682

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

51 pp

QUESTIONS PRESENTED FOR REVIEW

These questions arise in the context of Nebraska statutes, under which death is a potential penalty for the crime of first degree murder, which may be committed under a felony murder theory, but in which the determination of whether the convicted individual is "death eligible" is reserved exclusively to the penalty phase of that proceeding.

1. The opinion of the Eighth Circuit Court of Appeals creates a direct and admitted conflict with the opinion of the Ninth Circuit Court of Appeals in *Greenwalt v. Ricketts*, 943 F.2d 1020, 1029 (9th Cir. 1991), *cert. denied*, 506 U.S. 888 (1992) which requires resolution.

2. May a federal court require a state court, in a first degree murder case being prosecuted under a traditional felony murder theory, to ignore state substantive law and instruct its guilt phase juries on lesser homicide offenses which have never been recognized as lesser included offenses of first degree felony murder, in order to satisfy this Court's ruling in *Beck v. Alabama*?

3. May a federal court require that states reach the "death eligibility" determination in the course of the guilt phase of trial, or may the relative culpability concerns expressed by this Court in *Enmund v. Florida* be satisfied by the "death eligibility" determination being addressed during the penalty phase of trial as currently required by Nebraska statute?

4. Is the rule announced by the circuit court a "new rule" under *Teague v. Lane*?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES CITED

Page

CASES

TABLE OF AUTHORITIES CITED – Continued

Page

CONSTITUTIONAL PROVISIONS

STATUTES AND RULES

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit in question here can be found at *Reeves v. Hopkins*, 102 F.3d 977 (8th Cir. 1996) and at App. 1.

JURISDICTION

The opinion of the United States Court of Appeals for the Eighth Circuit was issued on December 24, 1996.

Your petitioner's (hereinafter "Warden") motion for rehearing and suggestion for rehearing en banc was denied on February 27, 1997.

CONSTITUTIONAL PROVISIONS

Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Constitution of the United States, Eighth Amendment.

STATEMENT OF THE CASE

The crime

The following is taken from the opinion of the Nebraska Supreme Court in the course of its mandatory direct appeal of Reeves' convictions and sentences found at *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984) (hereinafter *"Reeves I"*).

At 3:46 a.m. on March 29, 1980, Janet L. Mesner made a 911 emergency call and reported that she had been stabbed, that she thought a friend was dead from stab wounds, and that her address was 3319 South 46th Street, Lincoln, Nebraska. This address was a Religious Society of Friends meetinghouse, a place in which those of the Quaker religious faith meet. Since 1977, Janet Mesner had been a live-in caretaker of the premises. Victoria L. Lamm and her 2-year-old daughter were visitors.

Lincoln police officer Steven R. Imes responded to the call and, upon his arrival, found Janet Mesner lying on the floor in the rear of the house and attended by two or three firemen. She had seven stab wounds to her chest. When Officer Imes asked who had stabbed her, Janet replied, "Randy Reeves." The officer asked if there was anyone else still in the residence. Janet replied, "My friend, I think she's dead, and a little girl."

Officer Imes then went upstairs and found the partially clad body of Victoria Lamm lying face up in the south bedroom. There was a fatal stab wound in her chest, which penetrated the main pulmonary artery of the heart, and a stab wound in her midline, which pierced the liver.

The disordered condition of the room in which Victoria's body was found indicated that a violent struggle had taken place. The floor was covered with blood, and several articles of women's bedclothes, a piece of luggage, and papers were strewn about the room. A lamp and sewing machine were overturned, and the telephone was ripped from its wall socket. A billfold containing identification of the defendant

was found near Victoria Lamm's foot. In the middle of the blood-soaked sheets on the bed, underwear, later identified as belonging to the defendant, was found. Later examination of the underwear revealed the presence of spermatozoal secretions of the defendant's blood type. Next to the bed was one of the defendant's socks. A serrated kitchen knife with Janet Mesner's blood on it was found near the bed.

When Officer Imes was investigating the bedroom, Victoria's 2-year-old daughter walked from the north upstairs bedroom. She was unharmed.

On the main floor the police found an open window in a small room adjoining the kitchen. On the outside of the house below the open window was a garbage can turned upside down. Next to the garbage can were two shoe prints in the mud; inside the house was a shoeprint in the downstairs den – all of which had the same characteristics as the shoes the defendant was wearing at the time of his arrest.

Janet Mesner was taken to Lincoln General Hospital in Lincoln where she was attended to by Drs. Chester Paul and Denise Capek. When Dr. Paul first saw Janet, she was in shock and emergency medical procedures were being undertaken.

Officer Richard J. Lutz, who had been dispatched to the emergency room, was present when Janet arrived. Janet told the officer that she had been "raped and stabbed" by Randy Reeves, and she gave his description. Janet did not know how Randy gained entrance to the residence, but she knew he was alone. She referred to the defendant as her cousin, and

> repeatedly stated, "I don't know why Randy would do such a thing to me or to my girl friend." Despite the efforts made on her behalf, Janet died at approximately 5:55 a.m.

Reeves I, 344 N.W.2d at 438-439.

Reeves subsequently was arrested and confessed to the rape and murder of Janet Mesner. *Id.*, 344 N.W.2d at 439.

State court proceedings

Reeves was charged with two counts of first degree murder under a felony murder theory. Neb. Rev. Stat. § 28-303 (1995).[1] The "predicate felony" of each of those charges being the first degree sexual assault of Janet Mesner.

Reeves pled not guilty.

A jury convicted Reeves of both counts for first degree murder. A three-judge sentencing panel then heard the penalty phase of the trial and ultimately sentenced Reeves to death for each murder.

The Nebraska Supreme Court, although it modified the mix of aggravating and mitigating circumstances to

---

[1] "A person commits murder in the first degree if he kills another person (1) purposefully and with deliberate and premeditated malice, or (2) in the perpetration of or attempt to perpetrate any sexual assault in the first degree, arson, robbery, kidnapping, hijacking of any public or private means of transportation, or burglary . . . "

Reeves' benefit[2] and reweighed, ultimately affirmed Reeves' convictions and sentences of death on mandatory direct appeal[3] in *Reeves I*.

Reeves next sought collateral state postconviction relief.[4] The state trial court denied postconviction relief, the Nebraska Supreme Court affirmed that denial of relief and this Court granted certiorari ordering further review in light of this Court's recent decision in *Clemons v. Mississippi*. *State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359 (1990), *cert. granted*, 498 U.S. 964 (1990) (hereinafter *"Reeves II"*).

Pursuant to this Court's order, the Nebraska Supreme Court again considered Reeves' complaints in view of *Clemons* and again affirmed denial of postconviction relief. *State v. Reeves*, 239 Neb. 419, 476 N.W.2d 829 (1991), *cert. denied*, 506 U.S. 837 (1992) (hereinafter *"Reeves III"*).

Federal habeas review

In July 1990 Reeves filed his first federal habeas corpus petition and obtained a stay of execution.

In December 1994 the United States District Court for the District of Nebraska (hereinafter "district court") first granted Reeves relief.[5]

---

[2] In the Nebraska Supreme Court's de novo review of Reeves' sentences that court gave Reeves the benefit of an additional mitigating circumstance denied him at his trial level sentencing. *Reeves I*, 344 N.W.2d at 448.

[3] Neb. Rev. Stat. § 29-2525 and § 29-2528 (1995).

[4] Neb. Rev. Stat. § 29-3001 et seq. (1995).

[5] *Reeves v. Hopkins*, 871 F.Supp. 1182 (D.Neb. 1994)

On appeal to the United States Court of Appeals for the Eighth Circuit (hereinafter "circuit court") the district court's grant of relief was reversed and the matter remanded for consideration of Reeves' remaining claims. *Reeves v. Hopkins*, 76 F.3d 1424 (8th Cir. 1996).

On remand the district court again granted Reeves' relief upon yet another claim.[6] On appeal the circuit court again reversed the district court's grant of relief. However, the circuit court concluded that Reeves' *Beck v. Alabama*, 447 U.S. 625 (1980) claim, upon which the district court had denied Reeves habeas relief, merited relief and ordered Reeves either resentenced to life imprisonment or retried. App. 1.

The Warden's motion for rehearing and suggestion for rehearing en banc was denied by the circuit court. App. 21. This petition follows.

ARGUMENT

I.

THE CIRCUIT COURT ACKNOWLEDGES THAT ITS OPINION CREATES A DIRECT SPLIT OF AUTHORITY WITH THE NINTH CIRCUIT COURT OF APPEALS ON THE QUESTIONS PRESENTED.

> A petition for a writ of certiorari will be granted only for compelling reasons. The following . . . indicate the character of the reasons the Court considers: (a) a United States court of appeals

[6] *Reeves v. Hopkins*, 928 F.Supp. 941 (D.Neb. 1996).

> has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; . . .

Rule 10(a), *Rules of the Supreme Court of the United States*.

The Eighth Circuit's opinion specifically acknowledges that its resolution of this case is in direct and irreconcilable conflict with the opinion of the United States Court of Appeals for the Ninth Circuit issued in *Greenwalt v. Ricketts*, 943 F.2d 1020, 1029 (9th Cir. 1991), *cert. denied*, 113 S.Ct. 252 (1992). The Eighth Circuit opinion does not distinguish the facts or law of *Greenwalt* from those presented by Reeves' claim here.[7] The Eighth Circuit's disagreement could not be more straightforward: "We cannot agree with [the *Greenwalt*] interpretation of the *Beck* doctrine." App. 9.

All disagreements between the circuit courts on questions of law prevent the uniform application of federal constitutional law throughout the land. However, this disagreement arises in the context of a capital case and dramatically alters the potential outcome of two, otherwise indistinguishable cases, thus heightening the already significant public interest in resolution of such conflicts by this Court.

Reeves has been ordered resentenced to life imprisonment or retried. Yet the statutory process under which Reeves would possibly be retried on the present

[7] The district court found the Ninth Circuit's reasoning and result in *Greenwalt* to be dispositive of this claim. "Judge Piester explicitly relied upon a Ninth Circuit case that was nearly on "all fours" with this case." App. 18.

charges has in this case been held by the circuit court inadequate to produce a constitutionally acceptable sentence of death upon the present charges. App. 16. Thus, Reeves' life has in all likelihood been spared by the circuit court's grant of relief based upon a theory of federal constitutional law wholly at odds with that voiced in *Greenwalt*.

In stark contrast, Greenwalt was executed by the State of Arizona in January 1997, after the *Reeves* opinion was released and after Greenwalt had specifically called the conflict created by the decision in *Reeves* to this Court's attention. See *Greenwalt v. Stewart*, ___ U.S. ___, 117 S.Ct. 794, 136 L.Ed.2d 735 (1997) (denying Greenwalt's application for a stay of his execution).

Such a disparity of result among the circuit courts on any question of law is troublesome. In capital cases it is unacceptable.

II.

BECK AND THE DISTINCT ROLE OF A NEBRASKA JURY

This Court's decision in *Beck* formed the foundation for both the Ninth Circuit's resolution of *Greenwalt* and the Eighth Circuit's opinion and order of relief in this case. Therefore, we begin our analysis with *Beck* as well.

At the outset we must note, as did the Ninth Circuit in *Greenwalt*, that *Beck* addressed an Alabama trial and sentencing system remarkably distinct from the Arizona and Nebraska systems at issue in *Greenwalt* and here. We

believe the Nebraska and Arizona processes for determining guilt of, and the appropriate punishment for, first degree murder are so fundamentally different from the Alabama statutes at issue in *Beck* that *Beck* does not dictate the grant of relief ordered in this case.

A.

Beck is, first of all, about juries and the choices and responsibilities placed upon them by state law.

As the circuit court's opinion notes,[8] the result in *Beck* is driven by this Court's concern with the impact that Alabama's unusual statutory trial and sentencing scheme had upon the jury's guilt phase factfinding role. "[W]e are unwilling to presume that a post-trial hearing will always correct whatever mistakes have occurred in the performance of the *jury's* factfinding function." *Beck* at 645-646 (emp.added). Nebraska simply does not place its juries in a situation even remotely analogous to that in which the *Beck* jury found itself.

Under the statutory system at issue in *Beck*, an Alabama jury was required to render a verdict upon *two* questions: (1) Guilt; and (2) Punishment. *Beck*, at 628-629. Yet Alabama statutes gave Beck's jury no discretion as to penalty, the only discretion the jury had with respect to their factual findings were in the realm of the defendant's guilt.

---

[8] App. 5-6, quoting from *Spaziano*.

Contrary to the circuit court's assumption,[9] Alabama juries were *not* informed that the trial court had the authority to override their mandatory verdict of death.[10] Therefore, from the all important mind set of Beck's jury, they were in fact confronted with an acquit-or-vote-death situation.

Also contrary to the panel opinion's reasoning,[11] this Court in *Beck* specifically recognized that the jury's mandatory verdict of death was routinely dispositive of the defendant's fate.

> [I]t is fair to infer that the jury verdict [regarding punishment] will ordinarily be followed by the judge *even though* he must hold a separate hearing in aggravation and mitigation before he imposes sentence.

Beck at 645 (emp.added).

B.

Nebraska juries are *never* placed in a *Beck*-like situation. First, Nebraska law never burdens its juries with any role whatsoever in the determination of appropriate

---

[9] App. 15, fn 13.

[10] Under the same Alabama statute at issue in *Beck* the Court described the Alabama system as follows: "The jurors were instructed to impose the death sentence if they concluded that the defendant was guilty, and *they were not told that the trial judge could reduce the sentence to a sentence of life imprisonment.*" *Hopper v. Evans*, 456 U.S. 605, 608 (1982) (emp.added).

[11] App. 15, fn. 13.

criminal punishment.[12] Second, when a determination of guilt has been made by a Nebraska jury it is *never* dispositive of the penalty to be imposed for the offense in question.

Again contrary to the circuit court's reasoning,[13] under Nebraska law even a defendant found guilty of first degree murder is simply not "death eligible" at the conclusion of the guilt phase of the trial. Only when the State has subsequently proven beyond a reasonable doubt, at the non-jury penalty phase of the trial, the presence of (1) one or more specific statutory aggravating circumstances, and (2) that those aggravating circumstances standing alone merit a sentence of death, does the guilty individual first become "death eligible" under Nebraska law. See *Tuilawpa v. California*, 512 U.S. 967 (1994) and Neb. Rev. Stat. § 29-2522 (1995).

Thus, the all-or-nothing guilt and sentencing system at issue in *Beck*, simply is not before this Court on the facts of this case.

---

[12] See Neb. Rev. Stat. § 29-2261 (1995); Neb. Rev. Stat. § 29-2522 (1995).

[13] App. 9.

III.

THE PANEL OPINION ABANDONS THE LEGAL CONCEPT OF A "LESSER INCLUDED OFFENSE" PIVOTAL IN *BECK, HOPPER* AND SIMILAR CASES, AND REPLACES IT WITH THE RADICALLY DIFFERENT CONCEPT OF OFFENSES WHICH SIMPLY MERIT LESSER PUNISHMENT.

This Court's second concern in *Beck* was that a jury which was afforded no discretion with respect to its verdict on punishment might compromise its guilt phase factfinding if they were prevented from considering otherwise existing "lesser included offenses".

Thus, *Beck* also turns upon a legally sound understanding of the term "lesser included offense".

A. What is a "lesser included offense"?

The Nebraska and federal courts employ the same legal standard to determine what is and what is not a "lesser included offense".

1. The federal test

In *Schmuck v. U.S.*, 489 U.S. 705 (1989) this Court acknowledged the long accepted concept of "lesser included offense" so pivotal to the outcome of *Beck, Hopper v. Evans*, 456 U.S. 605 (1982) and *Spaziano v. Florida*, 486 U.S. 447 (1984), and which should have been pivotal to the appropriate outcome of this case.

The linchpin of "lesser included offense" analysis is that the elements of any "lesser included offense" must be included in the elements of the greater offense.

> [O]ne offense is not "necessarily included" in another unless the elements of the lesser offense are a subset of the elements of the charged offense. *Where the lesser offense requires an element not required for the greater offense, no instruction is to be given . . .*

Schmuck at 716 (emp.added).

2. The Nebraska test

As do the federal courts, the State of Nebraska employs an elements test to determine whether an offense is a "lesser included offense" of the crime charged,[14] and employed that test in rejecting Reeves' request for instructions upon the offenses of second degree murder and manslaughter. *Reeves I*, 344 N.W.2d at 442.

3. Nebraska substantive law

Employing the elements test favored by both Nebraska and federal courts, Nebraska law has for a

---

[14] "As set out in *State v. Lovelace*, 212 Neb. 356, 360, 322 N.W.2d 673, 675 (1982), 'To determine whether one statutory offense is a lesser-included offense of the greater, we look to the elements of the crime and not to the facts of the case.'

That proposition is now the settled law of this state. There are obviously other ways of considering the difficult question of lesser-included offenses, but Nebraska has adopted the statutory elements test." *State v. Coburn*, 218 Neb. 144, 352 N.W.2d 605, 608 (1984); *State v. Null*, 247 Neb. 192, 526 N.W.2d 220, 228 (1995).

century recognized that second degree murder and manslaughter are *not* lesser included offenses of the crime of first degree murder committed under a felony murder theory. *Morgan v. State*, 51 Neb. 672, 71 N.W. 788 (1897); *State v. Masters*, 246 Neb. 1018, 524 N.W.2d 342 (1994).

B. Nebraska law requires that juries be instructed upon lesser included offenses.

Again contrary to the circuit court's characterization,[15] Nebraska law has long recognized the availability of and required the giving of lesser included offense instructions, when requested (1) if lesser included offenses of the crime charged by the State *existed* under Nebraska law, and (2) if the record would support the giving of instructions on the lesser included crimes. *State v. Heubner*, 245 Neb. 341, 513 N.W.2d 284 (1994).

However, as noted immediately above, under Nebraska substantive law no lesser included homicide offenses *exist* under Nebraska law when first degree murder is charged under a felony murder theory.

---

[15] App. 11, fn. 11.

IV.

SPAZIANO ENLIGHTENS US AS TO WHAT THE CONSTITUTION DEMANDS WHERE LESSER INCLUDED OFFENSES OF THE CRIME CHARGED SIMPLY DO NOT EXIST UNDER STATE LAW.

In *Spaziano* this Court faced a situation very similar to that before us here and resolved it in a manner contrary to the circuit court's resolution here. In *Spaziano* this Court stated:

> Where no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the process. *Beck* does not require that result.

Id., 486 U.S. at 455.

It is worthy of note here that in *Beck* there *did* exist, under Alabama substantive law, a "lesser included offense" of the capital crime with which Beck was charged. However, that crime was not second degree murder or manslaughter, but non-capital felony murder.[16] The evil observed by this Court in the Alabama statutory scheme was that it denied Beck an instruction on an otherwise legitimate lesser included offense which *existed* under state law. In stark contrast to *Beck*, here there were neither legislative nor judicial efforts to deny Reeves instructions upon an otherwise existing "lesser included offense".

In *Spaziano*, lesser included offenses had existed, but were barred by the applicable state statute of limitations

---

[16] "Felony murder is thus a lesser included offense of the capital crime of robbery-intentional killing." *Beck* at 628.

at the time of trial. Under that circumstance did our federal constitution prevent Spaziano's jury from considering his guilt solely of the crime of felony murder? It did not. Did that fact prevent the ultimate imposition of a sentence of death? It did not.

The circuit court's opinion attempts to analogize a century of Nebraska Supreme Court holdings that second degree murder and manslaughter simply are not lesser included offenses of felony murder, with the affirmative legislative prohibition of instructions upon an otherwise recognized lesser included offense in *Beck*.[17] They are simply not the same.

If they were identical, then how does one distinguish the action of the Arizona legislature in establishing limitations upon the prosecution of lesser included offenses from the Alabama legislation criticized in *Beck*? This Court allowed a statute of limitations to end the "existence" of a recognized lesser included offense in *Spaziano*, but that legislation did not produce the same constitutional violation observed in *Beck*. This Court's holding in *Spaziano* provides a clear message relevant here: If no lesser included offenses exist at the time of trial, our federal constitution does not require that instructions be given upon non-existent offenses nor does it prevent the eventual imposition of a sentence of death for such an offense.

> We do not read *Beck* or any other case as establishing a constitutional requirement that states create a noncapital murder offense for every set

[17] App. 11, pp. 11-12 and fn. 11.

> of facts under which a murder may be committed.

Hatch v. Oklahoma, 58 F.3d 1447, 1454 (10th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1881 (1996). Yet that is exactly what the circuit court opinion seems to command.

In the *Beck* opinion itself this Court cited with approval *State v. Valencia*, 121 Ariz. 191, 589 P.2d 434 (1979) in which a capital sentence was affirmed in the face of a complaint that a lesser homicide instruction should have been given. *Id.*, 477 U.S. at 636, n.12.

V.

THERE EXISTS A VAST DIFFERENCE BETWEEN A "LESSER INCLUDED OFFENSE" AND AN OFFENSE WHICH MERELY MERITS LESSER PUNISHMENT.

The circuit court opinion further errs when it abandons the concept of "lesser included offense" pivotal to the result in *Beck*, *Hopper* and *Spaziano* in its analysis and instead creates from whole cloth a constitutional requirement for instructions upon any offense meriting "lesser" punishment.[18] This shift of emphasis from the concept of lesser *included* offenses, to the concept of simply "lesser" offenses is not the subject of the cases relied upon by the circuit court opinion and its adaptation is fundamentally disruptive of this accepted concept of American law.

Under our American system of criminal justice it is the State, not the defendant, who selects the crime to be charged and the elements of that crime which the State

[18] App. 13.

assumes the burden to prove.[19] We are aware of no authority permitting a criminal defendant to place upon the State the burden of proving crimes or the elements of crimes distinct from the crime the State desires to prosecute. Yet the result of the panel opinion is to place *exactly* that power in the hands of a criminal defendant.

Admittedly second degree murder and manslaughter are offenses which under Nebraska law merit "lesser" punishment than does first degree felony murder, but so are trespassing, breaking and entering, and indecent exposure. The latter are all offenses arguably committed by Reeves, but those were not the offenses the State of Nebraska elected to prosecute against him.

Under *Schmuck* the appropriate query is: Are *all* of the elements of the lesser crime upon which the defendant desires instructions *included* among the elements of the greater crime the State has elected to prosecute? If it does, then the State's burden is not increased by the giving of the lesser included instructions. However, if merely "lesser" offenses must be instructed upon then elements which are *not* elements of the crime charged suddenly and belatedly are placed at issue before the jury. This practice would lead to the same type of illogical jury process rejected by the Court in *Spaziano*.

---

[19] "At common law the jury was permitted to find the defendant guilty of any lesser offense *necessarily included in the offense charged*. This rule originally developed as an aid to the prosecution in cases in which the proof failed to establish some element *of the crime charged*." *Beck* at 633 (emp.added).

Neither *Beck* nor *Hopper* nor *Spaziano* command instructions upon any or all *lesser* offenses, but only instructions upon existing lesser *included* offenses.

VI.

REEVES WAIVED HIS OPPORTUNITY TO HAVE HIS JURY INSTRUCTED UPON A "THIRD OPTION".

It is also important to note here that there did exist a "lesser included offense" to the crimes with which Reeves was charged. The offense of first degree sexual assault was clearly a lesser included offense of the crimes with which Reeves was charged, it was the predicate felony upon which the felony murder charges were based.

Yet Reeves *did not ask* for lesser included offense instructions upon that offense. Reeves' strategic choice in that regard denied Reeves the opportunity to have his jury instructed upon a lesser included offense – a "third option" – meriting punishment less severe that the range of punishment established for the first degree murder with which he was charged. See *Schad v. Arizona*, 501 U.S. 624, 647-648 (1991).

Instead, Reeves placed his hopes solely upon a tactic of attempting to persuade his trial court to instruct upon lesser, but not lesser included, homicide offenses which for over a century Nebraska law had prohibited.

VII.

THE LEGITIMATE CONCERNS OF *ENMUND* ARE SPECIFICALLY ADDRESSED BY THE PENALTY PHASE OF A NEBRASKA FIRST DEGREE MURDER TRIAL.

The circuit court opinion sees some nexus between the constitutional concerns outlined in *Beck* and the constitutional concerns recognized by the Court in *Enmund v. Florida*, 458 U.S. 782 (1982). App. 12-13. We do not dispute the legitimacy of the concerns noted in either of those cases. However, we observe them to be two distinct concerns, each specifically, separately and adequately addressed by Nebraska's sentencing process.

Enmund found that it offended the Eighth Amendment that an individual "who aids and abets a felony in the course of which a murder is committed by others but who [1] does not himself kill, [2] attempt to kill, or [3] intend that a killing take place or [4] that lethal force will be employed"[20] be sentenced to death as Enmund had been under Florida law.

Again, the distinctions between Reeves' situation under Nebraska law and the Court's concerns in *Enmund* are significant.

A.

First, Reeves was convicted under a statute which *required* that he be a killer.

---

[20] *Enmund* at 797.

Neb. Rev. Stat. § 28-303 provides: "A person commits murder in the first degree if *he kills* another person . . . (2) in the perpetration of or attempt to perpetrate any sexual assault in the first degree . . . " (emp.added). The statute under which Enmund was convicted had no such requirement.

Furthermore, under the specific facts of this case there exists absolutely no question that Reeves was the one and only individual responsible for the murders of both Janet Mesner and Victoria Lamm.

Thus, the *Enmund* concern that a relatively "innocent" actor might be sentenced to death under a felony murder theory, is not present here under either Nebraska law or the specific facts of this case.

B.

Second, at the penalty phase of a first degree murder trial the Nebraska legislature has directed specific inquiry into exactly the concerns which were absent in *Enmund* and thus prompted this Court's intervention.

Under the Florida system, neither the elements of Enmund's crime nor the penalty phase process addressed this Court's Eighth Amendment concerns.[21] Yet under Nebraska law at least two statutory mitigating circumstances prompt inquiry into the relative culpability of the defendant for the homicide in question. "The offender was an accomplice in the crime committed by another person and his participation was relatively minor." Neb.

---

[21] *Enmund* at 785.

Rev. Stat. § 29-2523(2)(e) (1995). "At the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication." Neb. Rev. Stat. § 29-2523(2)(g) (1995).

The Florida system which sentenced Enmund to death focused exclusively upon the nature of the homicides rather than the relative culpability or level of participation of the individual found guilty of those killings.[22] Nebraska Mitigator E, which most closely addresses the Court's concerns in *Enmund*, is simply not applicable here. Reeves singlehandedly murdered these two women. Furthermore, Reeves was specifically afforded the benefit of Nebraska Mitigator G[23] in the "weighing" process, while Enmund received the benefit of absolutely no mitigation despite his relatively minor involvement in the homicides at issue in that case.

A comparison of the Nebraska system and the Florida system at issue in *Enmund* fails to produce any significant similarities from the standpoint of the Eighth Amendment concern here. Furthermore, the radically dissimilar facts of the two cases argue strongly against the result ordered here by the circuit court.

---

[22] *Enmund* at 785.

[23] See *Reeves I*.

VIII.

THE RULING OF THE CIRCUIT COURT CREATES A "NEW RULE" UNDER *TEAGUE V. LANE*.

In addition to the concerns noted above, we believe the rule announced by the circuit court, if a correct statement of the law, is a "new rule" as defined by this Court's opinion in *Teague v. Lane*, 489 U.S. 288 (1989) and therefore cannot form the basis of relief for Reeves.

Certainly the rule announced by the circuit court was not in place at the time that Reeves' sentences became final. Furthermore, the direct conflict presently existing with the Ninth Circuit on this very question indicates that the rule announced by the circuit court in this case was susceptible to debate among reasonable minds long after Reeves' convictions and sentences became final.

CONCLUSION

A distinct split of authority exists between the manner in which the Ninth Circuit and the Eighth Circuit have resolved the questions presented. That split of authority requires remedy if our federal constitution is to have uniform meaning and application throughout our country.

In the end the Eighth Circuit opinion concludes that no state may impose the death penalty under a historically accepted definition of felony murder.[24] Instead,

---

[24] App. 13.

States are commanded to amend their definitions of "felony murder" to require a showing of a specific intent to kill with respect to the homicide. This is an invasion of the States' right to define crimes and their punishment not authorized or justified by either *Beck* or *Enmund*.

The evils which the Court remedied in *Beck* and *Enmund* simply are not present in this case.

Respectfully submitted,

DON STENBERG
Attorney General

J. KIRK BROWN
Counsel of Record
Assistant Attorney General
P.O. Box 98920
Lincoln, Nebraska 68509-8920
Tel: (402) 471-2682

[Material Irrelevant To This Petition Deleted In Printing]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 95-1098/95-1188

Randolph K. Reeves, Appellee/Appellant v. Frank X. Hopkins, Warden of the Nebraska Penal and Correctional Complex, Appellant/Appellee.	* * * * * * * * * *	Appeal from the United States District Court for the District of Nebraska.

Submitted: September 9, 1996
Filed: December 24, 1996

Before BOWMAN, BRIGHT, and BEAM, Circuit Judges

BEAM, Circuit Judge.

Randolph Reeves was convicted of two counts of felony murder and sentenced to death. Following unsuccessful appeal and postconviction actions in Nebraska state court, Reeves was granted habeas corpus relief in

federal district court. We reversed, but retained jurisdiction and remanded to the district court for findings on Reeves's remaining claims. The district court again granted the petition and vacated Reeves's death sentence. For the second time, the State appeals the district court's grant of the writ.

We conclude that the district court erred in its grounds for granting the writ. We also conclude, however, that the district court erred in deciding that Reeves was not entitled to a jury instruction on lesser included offenses, a violation of *Beck v. Alabama*, 447 U.S. 625 (1980). On this basis, we conditionally grant Reeves's petition for habeas corpus.

I. BACKGROUND

The facts of this case are set out fully in the Nebraska Supreme Court's opinion in Reeves's state appeal. *State v. Reeves*, 344 N.W.2d 433, 438-40 (Neb. 1984) ("*Reeves I*"). A summary, however, is in order.

On March 29, 1980, Reeves killed Janet Mesner and Victoria Lamm in a Quaker meetinghouse in Lincoln, Nebraska. Ms. Mesner and Reeves were friends, and were in fact related. Reeves, who had been drinking heavily and had ingested some peyote buttons, entered a window of the house and either sexually assaulted or attempted to sexually assault Ms. Mesner in her bedroom. In the course of the assault, Reeves stabbed Ms. Mesner seven times with a knife he had taken from the kitchen. When Ms. Lamm entered the room during the assault, Reeves stabbed her to death. Ms. Mesner was mortally wounded, but was able to find a telephone and dial 911. Ms. Mesner

identified Reeves as her attacker before dying less than three hours later at a local hospital.

Reeves was charged with two counts of murder in the course of or while attempting a sexual assault in the first degree. *See* Neb. Rev. Stat. § 28-303. Reeves presented defenses of insanity and diminished capacity, but was convicted on both counts. Under Nebraska law, a first degree felony murder conviction carries possible sentences of life imprisonment or death. Neb. Rev. Stat. § 28-105(1). A three-judge sentencing panel sentenced Reeves to death. On appeal, the Nebraska Supreme Court held that the sentencing panel had failed to consider a mitigating factor and had improperly applied an aggravating factor in determining Reeves's sentence. *Reeves I*, 344 N.W.2d at 447-48. The court, however, reexamined the applicable factors and affirmed the death sentence. *Id.* at 448.

Reeves then pursued state postconviction remedies. The Nebraska Supreme Court again affirmed his sentence. *State v. Reeves*, 453 N.W.2d 359, 388 (Neb. 1990) ("*Reeves II*"). The United States Supreme Court, however, vacated *Reeves II* and remanded the case for reconsideration in light of its holdings in *Clemons v. Mississippi*, 494 U.S. 738 (1990). *Reeves v. Nebraska*, 498 U.S. 964 (1990). On remand, the Nebraska Supreme Court once again affirmed Reeves's sentence. *State v. Reeves*, 476 N.W.2d 829, 841 (Neb. 1991) ("*Reeves III*").

Reeves then brought this federal habeas corpus action under 28 U.S.C. § 2254, raising forty-four claims. The district court granted relief on the ground that the Nebraska Supreme Court did not have authority under

state law to independently reweigh aggravating and mitigating factors in affirming a death sentence. *Reeves v. Hopkins*, 871 F. Supp. 1182, 1202 (D. Neb. 1994). The district court considered and rejected Reeves's claims related to jury instructions, including a claim that the trial court improperly denied his request to have the jury instructed on lesser included offenses of felony murder, in violation of *Beck v. Alabama*, 447 U.S. 625 (1980). *Reeves v. Hopkins*, 871 F. Supp. at 1205.[1] The court left unresolved seven of Reeves's claims.[2]

On appeal we reversed, holding that the district court exceeded federal court authority in determining that Nebraska law did not authorize the Nebraska Supreme Court to reweigh aggravating and mitigating factors in capital cases. *Reeves v. Hopkins*, 76 F.3d 1424, 1427 (8th Cir.), *cert. denied*, 117 S. Ct. 307 (1996). We did not reach Reeves's *Beck* claim, instead remanding and instructing the district court to make determinations on the claims it had not reached. *Id.* at 1430-31. We expressly noted that we retained jurisdiction on those issues decided by the district court that we had not reached, and would consolidate those issues with any future appeal. *Id.* at 1431.

On remand, the district court rejected all but one of Reeves's remaining claims. The court determined that the Nebraska Supreme Court had resentenced Reeves in

---

[1] The court also rejected Reeves's claim 44, challenging the introduction at trial of Janet Mesner's statements identifying Reeves as her attacker. *Reeves v. Hopkins*, 871 F. Supp. at 1210. Reeves has not cross-appealed this determination.

[2] The court did not reach claims 5, 6, 26, 27, 34, 36, and 38.

Reeves III when it again affirmed the death penalty on remand from the United States Supreme Court, but violated due process by failing to give Reeves notice of resentencing and an opportunity to be heard. *Reeves v. Hopkins*, 928 F. Supp. 941, 965-66 (D. Neb. 1996).[3]

The State appeals the district court's findings on the due process claim, and we agree that the court below erred on this issue. We also conclude, however, that Reeves's *Beck* claim is meritorious and that the district court improperly rejected this claim in its first decision in 1994.

II. DISCUSSION

In this section 2254 habeas corpus action, we review the district court's factual findings for clear error and its legal conclusions de novo. *Culkin v. Purkett*, 45 F.3d 1229, 1232 (8th Cir.), *cert. denied*, 116 S. Ct. 127 (1995).

* * *

B. The *Beck* Claim

Reeves was charged with two counts of first degree murder under a felony murder theory, for killing during the course of a first degree sexual assault or attempted

---

[3] The district court also concluded that our retention of jurisdiction in our prior decision rendered it without authority to consider Reeves's motion to submit new evidence of actual innocence. *Reeves v. Hopkins*, 928 F. Supp. at 976. Reeves appeals this conclusion. Because we grant the writ on other grounds, we need not reach this issue.

first degree sexual assault.[8] Under Nebraska law, first degree murder is punishable by either life imprisonment or by death. Neb. Rev. Stat. §§ 28-303, 28-105(1). Reeves requested, and was denied, jury instructions on second degree murder and manslaughter.[9] The jury was therefore only instructed on the crime of first degree felony murder. Reeves argues that the refusal of his proposed instructions violated *Beck v. Alabama*, 447 U.S. 625 (1980). We agree.

---

[8] Reeves was charged under Neb. Rev. Stat. § 28-303, which provides that:

> A person commits murder in the first degree if he kills another person (1) purposely and with deliberate and premeditated malice, or (2) in the perpetration of or attempt to perpetrate any sexual assault in the first degree, arson, robbery, kidnapping, hijacking of any public or private means of transportation, or burglary.
>
> . . .

[9] The applicable statutory provisions are as follows:

> **§ 28-304. Murder in the second degree; penalty.**
>
> (1) A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation.
>
> **§ 28-305. Manslaughter; penalty.**
>
> (1) A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act.

Second degree murder carries a maximum sentence of life imprisonment. *Id.* at §§ 28-304(2), 28-105(1). Manslaughter carries a maximum sentence of twenty years. *Id.* at §§ 28-305(2), 28-105(1).

In *Beck*, the petitioner was tried on a single count of intentionally killing during the course of a robbery. *Id.* at 627. Under Alabama law, when a jury found a defendant guilty of this charge, it was required by statute to return a sentence of death. *Id.* at 628 n.3. The trial court, however, was the final sentencer and was free to impose the death sentence or a life term. *Id.* at 629 n.4. The statute under which Beck was charged expressly prohibited trial courts from giving instructions on lesser included noncapital offenses, even if the evidence would support a conviction on a lesser included offense. *Id.* at 628 & n.3.

The Supreme Court held that in a capital case due process requires that the jury be given the option of convicting the defendant on a lesser included noncapital offense if the evidence would support conviction on that offense. *Id.* at 638. The Court in *Beck* sought to avoid presenting juries with a "death or nothing" choice between conviction of a capital crime and finding the defendant not guilty. Faced with such a choice, jurors might decide to acquit, even though they believed that the defendant had committed a crime. On the other hand, they might convict of the capital crime, even though they felt that the defendant did not deserve the death penalty. This choice, the Court explained, is unacceptable because "the unavailability of the third option of convicting on a lesser included offense may encourage the jury to convict for an impermissible reason – its belief that the defendant is guilty of some serious crime and should be punished." *Id.* at 637. This risk of such a choice "cannot be tolerated in a case in which the defendant's life is at stake." *Id. See also Schad v. Arizona*, 501 U.S. 624, 646 (1991). As the Court later explained, "[t]he goal of the *Beck* rule . . . is to

eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence." *Spaziano v. Florida*, 468 U.S. 447, 455 (1984).

The State argues that *Beck* is inapplicable because the Nebraska Supreme Court has determined that, under state law, there are no lesser included offenses of felony murder. Both before and after Reeves's conviction, the Nebraska court repeatedly made clear its view that in felony murder cases "it is error for the trial court to instruct the jury that they may find defendant guilty of murder in the first degree, guilty of murder in the second degree, or guilty of manslaughter." *State v. Montgomery*, 215 N.W.2d 881, 883 (Neb. 1974). *See also State v. Massey*, 357 N.W.2d 181, 185-86 (Neb. 1984) (quoting *Reeves I*, 344 N.W.2d at 442); *State v. Hubbard*, 319 N.W.2d 116, 118 (Neb. 1982); *State v. McDonald*, 240 N.W.2d 8, 14 (Neb. 1976). We are directly faced, therefore, with the question whether the State's prohibition is consistent with *Beck*.

The State contends that once the Nebraska Supreme Court has determined that felony murder has no lesser included offenses, then Reeves's *Beck* claim necessarily fails. The State urges us to follow *Greenawalt v. Ricketts*, 943 F.2d 1020 (9th Cir. 1991), in which the Ninth Circuit rejected an Arizona prisoner's *Beck* claim. The court in that case reasoned that "Greenawalt was tried solely for felony murder, a crime for which Arizona law recognizes no lesser included offense." *Id.* at 1029 (citing *State v. Greenawalt*, 624 P.2d 828, 846 (Ariz. 1981)) (*en banc*). The court concluded on this basis that *Beck* was inapplicable.

We cannot agree with this interpretation of the *Beck* doctrine. The State's position would say in effect that *Beck* means only that a criminal defendant is entitled to instructions on lesser included offenses to which state law says he or she is entitled. But if this were true, then *Beck* itself would have been decided differently. In *Beck*, as in this case, state substantive law specifically prohibited the giving of a lesser included offense instruction. The problem was not merely a trial court's decision not to instruct the jury, nor was it Alabama's definition of lesser included offenses. The unacceptable constitutional dilemma was that state law *prohibited* instructions on noncapital murder charges in cases where conviction made the defendant death-eligible. The prohibition in Reeves's case is based on the Nebraska Supreme Court's pronouncement of state law, rather than upon a statute. But there is no principled reason to distinguish such a prohibition imposed by the state courts from one imposed by the state legislature.[10] The constitutional violation is the same.

---

[10] Similarly, the Fifth Circuit has held that the *Beck* doctrine imposes federal constitutional limits on state law governing when a trial court may refuse to give an instruction on a lesser included offense. *Cordova v. Lynaugh*, 838 F.2d 764, 767 (5th Cir. 1988). The court noted that "[i]f due process is violated because a jury cannot consider a lesser included offense that the 'evidence would have supported,' . . . the source of that refusal, whether by operation of state law or refusal by the state trial court judge, is immaterial." *Id.* at 767 n.2 (citation to *Beck* omitted).

We note that in rejecting a petitioner's *Beck* argument in *Blair v. Armontrout*, we stated that "*Beck* does not prescribe a first-degree murder instruction in this case unless first-degree

We believe that in arguing to the contrary, the State misreads the Supreme Court's clarifications of the *Beck* doctrine. In *Hopper v. Evans*, the Court held that under *Beck* "due process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction." 456 U.S. 605, 611 (1982) (emphasis in the original). In *Spaziano*, the Court held that *Beck* did not apply when the statute of limitations had run on all lesser included offenses and the defendant refused to waive the statute. 468 U.S. at 456-57. The Court stated that "[w]here no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the process. *Beck* does not require that result." *Id.* at 455.

---

murder is a lesser-included offense of capital murder . . . and the [State] Supreme Court [has held] that first-degree murder [is] not a lesser-included offense of capital murder." 916 F.2d 1310, 1326 (8th Cir. 1990). In *Blair*, however, we did not directly face the issue whether *Beck* could be vitiated by a state's determination that a particular crime has no lesser included offenses. There was no *Beck* violation in *Blair* because: (1) the jury had both the option and power to impose a life sentence, rather than a death sentence; and (2) the defendant *was* given jury instructions on both second degree murder and manslaughter. *Id.* Neither is true of this case.

We made a similar statement regarding a state's definitions of lesser included offenses in *Williams v. Armontrout*, 912 F.2d 924, 928 (8th Cir. 1990) (*en banc*). In that case, however, *Beck* did not apply because the evidence would not have supported a conviction for the charge for which the defendant requested an instruction. *Id.* at 929. *Williams* was thus squarely within the limitation on *Beck* clarified by *Hopper v. Evans*, 456 U.S. 605, 611 (1982) (holding that *Beck* requires instructions on noncapital offenses only when the evidence would support a conviction on that charge).

The Ninth Circuit in *Greenawalt* cited *Spaziano* to support its conclusion that Arizona's nonrecognition of any lesser included offenses foreclosed a *Beck* claim. *Greenawalt*, 943 F.2d at 1029. We believe that this reads *Spaziano* much too broadly. In *Spaziano*, the defendant *could not have been convicted* of any lesser included offenses because the applicable statutes of limitation had all run and the defendant refused to waive them. The Court found that instructing the jury on a charge that could not have resulted in a conviction would compound the distortion of factfinding that troubled it in *Beck*:

> Requiring that the jury be instructed on lesser included offenses for which the defendant may not be convicted . . . would simply introduce another type of distortion into the factfinding process.
>
> . . . *Beck* does not require that the jury be tricked into believing that it has a choice of crimes for which to find the defendant guilty, if in reality there is no choice.

Id. at 455-56. *Spaziano* does not stand, therefore, for the proposition that state law can foreclose *Beck* claims by declaring that felony murder has no lesser included offenses; this is exactly what the Alabama legislature had done in *Beck*, after all.[11] *Spaziano* stands, rather, for the

---

[11] The State argues that "but for the specific statute struck down which prohibited such jury instructions [on lesser included offenses], there existed, under Alabama law, lesser included offenses of the crime with which Beck was charged." State's Reply Brief (1995) at 11-12. But this is merely to say that "if state law had not prohibited an instruction, it would have permitted it." This is, of course, true. But it is equally true of Nebraska law.

eminently sound notion that juries should not be mislead into "convicting" someone of a charge for which he or she cannot be convicted. There is no question of such trickery in this case. Reeves could have been convicted and sentenced for either second degree murder or manslaughter.

The State's rationale for prohibiting instructions for noncapital murder in felony murder cases further supports our conclusion. The Nebraska Supreme Court has said that felony murder differs from other murder because it requires no showing of any intent to kill: "The turpitude involved in the [underlying felony] takes the place of intent to kill or premeditated malice, and the purpose to kill is conclusively presumed from the criminal intention required for [the underlying felony]." *Reeves I*, 344 N.W.2d at 442 (citations omitted). Thus, a finding that Reeves intended the underlying felony (actual or attempted first degree sexual assault) takes the place of any showing that Reeves intended to kill. At oral argument, the State reiterated that the difference between the mental states required for felony murder and premeditated first degree murder is the basis for the prohibition on lesser included offense instructions in felony murder cases.

There is nothing necessarily unconstitutional with the State's definition of the mental culpability required for a felony murder conviction. However, the *death penalty* cannot be imposed on a defendant without a showing of some culpability *with respect to the killing itself*. *Enmund v. Florida*, 458 U.S. 782, 801 (1982). Before a state can impose the death penalty, there must be a showing of

both major participation in the killing and reckless indifference to human life. *Tison v. Arizona*, 481 U.S. 137, 158 (1987). *Enmund* and *Tison* are thus independent constitutional requirements of the mental culpability a state must prove if it is to impose a *death sentence;* if the death sentence is to be imposed, the state must necessarily produce some evidence of intent with respect to the *killing*. Nebraska's rationale for prohibiting lesser included offense instructions in felony murder cases thus disappears when the defendant is sentenced to death. We are led to the conclusion that the State may not, consistent with the Constitution, bar an instruction on noncapital homicide, in a felony murder case where the death sentence is imposed, on the basis that felony murder requires no showing of intent or, at least, a reckless indifference to the value of human life. To hold otherwise would mean that the State could avoid *Beck* by claiming that it need show no intent or reckless indifference with respect to the killing, yet could simultaneously avoid *Enmund* by adducing precisely such evidence.

We do not suggest that the State may not impose the death penalty pursuant to a felony murder conviction. We mean to say only that the State's prohibition on instructions on noncapital charges in felony murder cases is inconsistent with *Beck*, and that its rationale for the prohibition would put *Beck* at odds with *Enmund*. In *Greenawalt*, the Ninth Circuit reads *Enmund* to apply only in situations of "accomplice felony murder" where the Eighth Amendment requires a specific showing of mens rea before the death penalty may be imposed. 943 F.2d at 1028. We think this unduly narrows the Supreme Court's holdings in *Enmund* as well as *Tison*, especially in cases

such as this. Reeves's insanity and diminished capacity defenses raise the same "mental state" concerns considered by the Court in both *Enmund* and *Tison;* indeed, the facts of this case and Reeves's defenses indicate the need for particular care that Reeves's "punishment . . . be tailored to his personal responsibility and moral guilt." *Enmund,* 458 U.S. at 801.

The death penalty concerns expressed in *Enmund* and *Tison* lie at the core of the *Beck* doctrine. As the Court explained in *Hopper, Beck* teaches that the Eighth and Fourteenth Amendments require that the death penalty must be "channeled so that arbitrary and capricious results are avoided." 456 U.S. at 611. We believe that Reeves's case comes within *Beck* and *Hopper.* The facts would have supported a conviction for either second degree murder or manslaughter, and unlike in *Spaziano,* Reeves could have been convicted and sentenced for those crimes. Instead, Reeves's jury was faced with a stark choice: convict Reeves of capital murder or acquit him altogether.[12] State law, whether expressed by a

[12] Furthermore, the "death or acquit" dilemma may have been exacerbated in Reeves's case. Reeves presented an insanity defense, but the trial court refused to instruct the jury that an acquittal by reason of insanity would not have resulted in Reeves's release. In addition, the prosecutor erroneously told the jury in summation that an acquittal would mean that Reeves would "walk out of this courtroom a free man." While the district court was unsure whether the prosecutor's statement referred to Reeves's insanity defense or merely to the effect of an acquittal on the merits, the Nebraska Supreme Court stated in *Reeves I* that "the statement made by the prosecutor was not an entirely correct statement of the law." 344 N.W.2d at 443. While we agree with the district court that neither the refused

statute or by a court, may not prohibit an instruction on a noncapital charge that the evidence supports when the defendant is subsequently sentenced to death.[13] We therefore hold that the trial court's refusal to grant Reeves's request for instructions on second degree murder and manslaughter violated *Beck v. Alabama.*

* * *

D. Relief

Having found Reeves's *Beck* claim meritorious, we must still determine what relief is appropriate. We have previously held that *Beck* only applies in cases where the defendant is in fact sentenced to death. *Pitts v. Lockhart,* 911 F.2d 109, 112 (8th Cir. 1990). The *Beck* violation in this case thus can be cured in one of two ways: (1) by granting Reeves a new trial; or (2) by resentencing Reeves to life imprisonment, which is a statutorily authorized sentence for felony murder.[15] We therefore find it appropriate to grant a conditional writ of habeas corpus: Reeves's conviction will be vacated subject to a new trial unless,

insanity instruction nor the prosecutor's misstatement is sufficient in itself to violate due process, *infra* at 18-19, the effect could only have heightened the "death or acquit" dilemma.

[13] The State argues that *Beck* involved a statute that automatically imposed the death sentence, whereas Reeves's jury had no involvement in sentencing. But the Alabama statute in *Beck* was not a "mandatory death" statute; the judge had final sentencing authority, and was free to reject the death penalty. Furthermore, Reeves correctly argues that when *Beck* was decided, the Supreme Court had already declared "mandatory death" statutes

[14] *See* Neb. Rev. Stat. §§ 28-303, 28-105(1).

within 180 days from the issuance of the mandate, his death sentence is modified to life imprisonment.

III. CONCLUSION

We find that the trial court's refusal to instruct the jury on noncapital murder charges violated *Beck v. Alabama*, and that the district court thus erred in dismissing Reeves's claim 20(b). We conditionally grant Reeves's petition for the writ of habeas corpus: his conviction will be vacated subject to a new trial unless the State resentences Reeves to life imprisonment within 180 days. Because we conclude that Reeves's due process argument is groundless, we reverse the district court's finding on claim 34. We affirm the district court's findings dismissing all of Reeves's other claims.

BRIGHT, Circuit Judge, concurring separately.

Judge Beam's well written opinion persuasively and logically explains that the application of *Beck v. Alabama*, 447 U.S. 625 (1980), requires that we remand this case for appropriate relief under a conditional writ of habeas corpus. I agree.

Having directed the issuance of a writ of habeas corpus, which will require the State of Nebraska either to retry Reeves or sentence him to life imprisonment, I would not reach the due process claim discussed in part II A of the court's opinion. In all other respects, I concur.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

[Material Irrelevant To This Petition Deleted In Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

RANDOLPH K. REEVES, Petitioner, vs. FRANK X. HOPKINS, Respondent.	)	CV90-L-311 **MEMORANDUM AND ORDER** (Filed Dec. 16, 1994)

This is a habeas corpus case, brought pursuant to 28 U.S.C. § 2254, challenging Petitioner's conviction for two murders and the death sentences which resulted. Pending before me is the thoughtful and comprehensive report, recommendation, and order (Filing 111) of the Honorable David L. Piester, United States Magistrate Judge, regarding Petitioner's amended petition for habeas corpus.

In his report and recommendation, Judge Piester addressed forty-four claims[1] asserted in Petitioner's amended petition and found that:

> 1. Petitioner abandoned certain claims (claims 3, 7, 15, 16, 33, 35, 37, 41, 43 and part of 44 (that portion not related to ineffective assistance of trial counsel)). (Filing 111, at 10-15.)
>
> 2. Certain of Petitioner's claims were procedurally defaulted (claim 20(c) (that part claiming that all types of

* * *

---

[1] For ease of reference, the numbered claims described on pages 6-9 of Judge Piester's report and recommendation are attached to this opinion as appendix A.

B.

Petitioner next complains about Judge Piester's resolution of claim 20(b). (Filing 111, at 40-41.) Petitioner argues that the state district court erred in not giving a lesser-included-offense instruction, thereby violating the rule announced in such cases as *Hopper v. Evans*, 456 U.S. 605, 611 (1982), and *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980). Judge Piester concluded that since the state supreme court had held in *Reeves I* that under Nebraska law second-degree murder and manslaughter are not lesser-included offenses of felony murder, federal law did not require a lesser-included-offense instruction.

Judge Piester explicitly relied upon a Ninth Circuit case that was nearly on "all fours" with this case. In *Greenawalt v. Ricketts*, 943 F.2d 1020, 1029 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 252 (1992), the United States Court of Appeals for the Ninth Circuit held that where, as in Arizona, there is no lesser-included offense under state law for felony murder, *Beck* and similar cases do not require, and may not even permit, the giving of such an instruction.

In arriving at this conclusion, Judge Piester recognized that he was precluded from reviewing the decision of the Nebraska Supreme Court that felony murder has no lesser-included offense. He cited *Blair v. Armontrout*, 916 F.2d 1310, 1326-30 (8th Cir. 1990), *cert. denied*, 112 S. Ct. 89-90 (1991) (rejecting the argument that the Missouri Supreme Court's rulings on first-degree murder as a lesser-included offense of capital murder were inconsistent), for the proposition that the federal courts may not review a state court's decision of state substantive law if

the decision rests on an adequate foundation. Indeed, as that case points out, the United States Supreme Court has ruled that "a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts." *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977).

Petitioner now argues that the Nebraska Supreme Court's opinion in *Reeves I* was not based upon an adequate foundation and that Judge Piester should have reviewed the court's conclusion that under Nebraska law there are no lesser-included offenses for felony murder. I disagree with Petitioner.

Simply stated, the opinion of the *Reeves I* court rests upon an adequate foundation of substantive state law. *Reeves I*, 216 Neb. at 217; 344 N.W.2d at 442 (citing and quoting *State v. Hubbard*, 211 Neb. 531; 319 N.W.2d 116 (1982)). In *State v. Hubbard*, decided before *Reeves I*, the Nebraska Supreme Court carefully considered and decided that felony murder has no lesser-included offenses and that it is error to give such an instruction, even if requested. *Hubbard*, 211 Neb. at 533-34; 319 N.W.2d at 118.

Essentially, the Nebraska Supreme Court ruled that in terms of intent there is a fundamental difference between first-degree murder, second-degree murder or manslaughter viewed as one class of murder, and felony murder viewed as another class of murder, and therefore, it would be improper to give a lesser-included-offense instruction that mixed the different concepts of intent. In reaching this conclusion, the Nebraska Supreme Court cited and analyzed various prior opinions of the Court.

Hubbard, 211 Neb. at 533-34; 319 N.W.2d at 118 (discussing *State v. McDonald*, 195 Neb. 625, 636-37, 240 N.W.2d 8, 15 (1976), and *State v. Bradley*, 210 Neb. 882, 885, 317 N.W.2d 99, 101-02 (1982)).

On one hand, the court observed that in a first-degree murder case, second-degree murder and manslaughter are subsumed as possible lesser-included offenses because all three offenses concentrate on the *intent required as to the killings*. On the other hand, in a felony murder case, second-degree murder and manslaughter are not subsumed as possible lesser-included offenses because felony murder concentrates on the *intent required to commit the underlying felony and not the intent required as to the killings*.

Accordingly, the Nebraska Supreme Court believed that it would improperly mix intent concepts to instruct that second-degree murder and manslaughter are lesser-included offenses of felony murder because felony murder focuses on one type of intent, i.e., intent to commit the act which constitutes the felony during which the killing occurred, while second-degree murder and manslaughter (as well as first-degree murder) focus on a fundamentally different type of intent, i.e., intent to kill.

While one can argue with this analysis, as the Ninth Circuit's opinion in *Greenawalt v. Ricketts* points out, other state courts have reached similar conclusions. Since the opinion of the Nebraska Supreme Court is founded upon a rational and thoughtful analysis of its own substantive law, there is no basis for a federal court to disregard the court's reasoned opinion as to its own law.

UNITED STATES COURT OF APPEALS
FOR THE EIGHT CIRCUIT

No. 95-1098NEL
No. 95-1188NEL

Randolph K. Reeves,	*	
Appellee/Appellant,	*	Order Denying
	*	Petition for Rehearing
vs.	*	and Suggestion for
	*	Rehearing En Banc
Frank X. Hopkins,	*	
	*	
Appellant/Appellee.	*	

The suggestion for rehearing en banc is denied. Judge Fagg, Judge Wollman, and Judge Loken would grant the suggestion.

The petition for rehearing by the panel is also denied.

February 27, 1997

Order Entered, at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

NO. 96-1693

In The

Supreme Court of the United States

October Term, 1996

FRANK X. HOPKINS, Warden of the
Nebraska Penal and Correctional Complex,

Petitioner,

v.

RANDOLPH K. REEVES,

Respondent.

On Petition for Writ of Certiorari to
the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

PAULA BELFORD HUTCHINSON
Counsel of Record
HUTCHINSON & GOVAERTS, P.C.
5815 South 58th Street, Suite C3
Lincoln, NE 68516
Tel: (402) 420-2156

KENT E. GIPSON
PUBLIC INTEREST
LITIGATION CLINIC
5319 Rockhill Road
Kansas City, MO 64110
Tel: (816) 363-2795

Counsel for Respondent

QUESTION PRESENTED

The real question presented in the petition is identical to that answered in *Beck v. Alabama*, 447 U.S. 625 (1980): "May a sentence of death constitutionally be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would support such a verdict?" *Id.* at 627.

INTERESTED PARTIES

The petioner is listed on the petition as State of Nebraska. The petition seeks review of a grant of a writ of habeas corpus under 28 U.S.C § 2254. The parties below were the respondent and Frank X. Hopkins, Warden of the Nebraska Penal and Correctional Complex.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to the Eighth Amendment, as indicated in the petition, this case involves the Due Process Clause of the Fourteenth Amendment, which provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

This case also involves Neb. Rev. Stat. §§ 28-303, 304, and 305 , which define the various degrees of murder under Nebraska law. The text of these statutes is set out in the decision below, petitioner's appendix at 6, nn.8 & 9 (hereafter "Appendix").

STATEMENT OF THE CASE

Respondent respectfully opposes the petition for writ of certiorari in which the petitioner asks this Court to depart from its established precedent to hold that state caselaw governing jury instructions in a capital case should preempt the protections afforded by the Eighth and Fourteenth Amendments. The decision of the Eighth Circuit Court of Appeals was a straightforward application of the rule announced by this Court in *Beck v. Alabama*, 447 U.S. 625 (1980), and does not warrant review by this Court.

FACTS

A recounting of facts beyond the selective version of the facts set out in the petition is in order. The relevant facts are as follows.

On the morning of March 28, 1980, the respondent, Randy Reeves, had planned to work at his construction job in Hastings, Nebraska, but the job was "rained out," so Mr. Reeves

and the rest of the crew went to a bar instead. From nine o'clock that morning and throughout the day and evening, Mr. Reeves and his friends continued to drink beer and other alcoholic beverages. During the afternoon, several members of the crew, including Mr. Reeves, traveled 100 miles to Lincoln. They visited friends, where they continued to drink, then went to a party. At the party, Mr. Reeves drank more alcohol and ingested peyote buttons. A friend who gave him a ride testified that by the time they left the party at about 1:30 a.m. on March 29, Mr. Reeves was "drunker than I'd ever seen him . . . . He appeared to be in a stupor." Mr. Reeves had this friend drop him off at an intersection that was a few blocks from the Quaker meeting house where his friend and cousin, Janet Mesner, was the live-in caretaker. *State v. Reeves*, 216 Neb. 206, 208-212, 344 N.W.2d 433, 438-440 (1984).

At 3:46 a.m. on March 29, Janet Mesner made a 911 emergency call and reported that she had been stabbed and that she thought that a friend in the house with her was dead from stab wounds. Police who responded found Ms. Mesner and the body of Victoria Lamm. Ms. Lamm's two-year-old daughter wandered out of a bedroom unharmed. In Ms. Mesner's bedroom, next to Ms. Lamm's body, was a billfold containing Mr. Reeves' identification. Underwear and a sock, found later to be Mr. Reeves', and a bloody kitchen knife, also were in plain sight. Ms. Mesner was transported to a hospital, where she told police Randy Reeves had stabbed her and raped her or tried to rape her. She repeatedly stated, "I don't know why Randy would do such a thing to me or to my girl friend." Janet Mesner died at approximately 5:55 a.m. *Id.*

Police arrested Mr. Reeves at 4:45 a.m. as he walked along a main street in Lincoln. At the time of his arrest, his eyes were red, and he had a great deal of blood on his body, including his penis, his hands and his clothes. In a police interview, Mr. Reeves responded

affirmatively when asked if he had had sex with Ms. Mesner. He also said that he could not remember much about the killings. A breath-alcohol test at 6:39 a.m. showed mescaline in his blood and a blood-alcohol concentration of .149 at the time. *Id.* Extrapolating back, this would indicate his blood-alcohol level at the time of the killings was as high as .230 *Reeves v. Hopkins*, 871 F.Supp. 1182, 1187 (D. Neb. 1994).

Mr. Reeves was charged with two counts of first-degree murder, solely on a felony-murder theory. He was not charged separately with any other crime. The defense requested, and was denied, jury instructions on second-degree murder and manslaughter. The defense stipulated to Mr. Reeves' having caused the deaths of the two women, and relied on a defense of insanity or, in the alternative, diminished capacity. At closing argument, the prosecutor admonished the jury that if the state did not win its case, Mr. Reeves would walk out of the courtroom a free man. The trial court refused to give a curative instruction, nor would the court instruct the jury on the consequences of an insanity verdict.[1] Mr. Reeves was convicted of both counts of first-degree murder and sentenced to death by a three-judge panel.

A unanimous panel of the Eighth Circuit Court of Appeals (Beam and Bowman, JJ.; and Bright, Senior Judge), reversing the district court[2], held that the refusal to instruct on a lesser-included offense contravened this Court's holding in *Beck v. Alabama*, 447 U.S. 625 (1980), and

---

[1]The panel found this comment, together with the trial court's refusal to give the requested instructions, did not amount to an independent constitutional violation; it did, however, "heighten" Mr. Reeves' *Beck* claim. Appendix at 14, n.12.

[2]The district court had twice granted relief on other grounds, both of which the Eighth Circuit also reversed. Both courts, however, were in agreement that Mr. Reeves' case was fraught with error. Indeed, the district court, in vacating the death sentence, opined that upon resentencing, a new panel which "calmly reviews the evidence anew" would sentence Mr. Reeves to life and not death. *Reeves v. Hopkins*, 871 F. Supp. at 1195 n. 16.

conditionally granted a writ of habeas corpus. Rehearing was denied, both by the panel and *en banc*. *Reeves v. Hopkins*, 102 F.3d 977 (8th Cir. 1996), *reh'g denied* February 27, 1997.

REASONS FOR DENYING THE WRIT

I.

THE "QUESTIONS PRESENTED," AS IDENTIFIED IN THE PETITION, ALL HAVE BEEN ANSWERED IN *BECK*.

A. A Blanket Rule Prohibiting Instruction on A Lesser Included Offense in a Capital Case Violates this Court's Holding in *Beck*.

The petitioner describes certain differences between Alabama law, applicable in *Beck*, and Nebraska law. Petition at 8-11. In this case, however, as in *Beck*, the relevant question is whether a constitutionally unreliable conviction for a capital offense obtained because the "jury [was] forced into an all-or-nothing choice between capital murder and innocence." *Spaziano v. Florida*, 468 U.S. 447, 455 (1984). The State's protracted discussion of state law in its petition does nothing to address this dispositive question.

The state makes much of the fact that Nebraska juries do not participate in the sentencing process. But it is the jury's decision to *convict*, not its advisory sentencing function, which is central to *Beck*. Post- *Beck* decisions from the United States Supreme Court indicate that the *Beck* holding does not turn on the mechanics of the sentencing phase. *Spaziano, supra*; *Schad v. Arizona*, 501 U.S. 624 (1991). Although neither Spaziano nor Schad received relief from their death sentences, this Court in each case reiterated the essential holding in *Beck* that the constitution will not permit a jury to be presented with the stark choice between conviction of a

capital crime and outright acquittal.

The petitioner also insists that Nebraska state law, i.e. that felony-murder has no lesser-included offense, should preempt the due process protections recognized in *Beck*. Petition at 12-15. But, as Judge Beam observed in the decision below, "if this were true, then *Beck* itself would have been decided differently." Appendix at 9. *Beck* vindicates the Eighth and Fourteenth Amendment requirement that the life-or-death decision be "channeled so that arbitrary and capricious results are avoided." *Hopper v. Evans*, 456 U.S. 605, 611 (1982) (explaining *Beck*). Nebraska caselaw forbidding instruction on any lesser-included offense to felony-murder (*e.g. State v. Hubbard*, 211 Neb. 531, 319 N.W.2d 116 (1982)) frustrates that requirement.

At the time of Mr. Reeves' trial, Nebraska caselaw required that juries be instructed on a lesser included offense when the evidence so warranted. *See, e.g., State v. Hegwood*, 202 Neb. 379, 275 N.W.2d 605 (1979) (cited in *Beck*, 447 U.S. at 637 n. 12 to support assertion that no state other than Alabama forbids lesser-include-offense instruction in a capital case[3]). As Judge Beam noted in the decision below, the facts would have supported convicting Mr. Reeves for either second-degree murder or manslaughter. Appendix at 14. The overwhelming evidence of diminished capacity presented by Mr. Reeves would have justified conviction of manslaughter and acquittal of felony-murder. The facts of this case, combined with the *Hegwood* rule, render irrational and arbitrary the state's ban on the giving of a lesser-included-offense instruction in felony-murder cases. *Beck* teaches that a jury must be instructed on a lesser offense when the evidence so warrants -- not merely when state law so allows. *Id.* at 637.

---

[3]Felony murder appears to be the sole exception in Nebraska law to the rule requiring instruction on lesser-included offenses. This exception was not mentioned in *Hegwood*.

It is inaccurate to suggest, as petitioner does at 8-11, that the jury in Nebraska plays no role whatsoever in the sentencing determination. The Reeves jury, as in all capital cases, had been death-qualified on voir dire, so they knew they were deciding a capital case. The jury in Mr. Reeve's case was forced into the position of rendering a *de facto* advisory death sentence, just as the *Beck* jury. The facts necessary to support a conviction in Mr. Reeves' case supplied the same factual basis for two statutory aggravating circumstances: the murder involved sexual abuse, and the crime involved two victims.[4] In Nebraska, under the felony-murder doctrine, the state is relieved of the burden of proving premeditation and malice. *See State v. Bradley*, 210 Neb. 882, 317 N.W.2d 99 (1982).[5] The jury, then, was limited in its determination to finding of historical facts about the crime. It was prevented from exercising its traditional role of evaluating the moral blameworthiness of the defendant by selecting from various grades of the offense. The result: Mr. Reeves began the "official" sentencing process with findings constituting two aggravating circumstances, **despite the absence of a finding that he intended to kill**.

The fact that the panel of judges have ultimate sentencing power in Nebraska does not distinguish this case from *Beck*. As this Court said,"[W]e are not persuaded that sentencing by the judge compensates for the risk that the jury may return an improper verdict because of the unavailability of a 'third option.'" *Id.* at 645. To put the sentencing panel in such a position, this

---

[4]Under Nebraska law, aggravating circumstance 1(d), "the murder was especially heinous, atrocious or cruel," has been intrepreted to involve murders involving "torture, sadism, or sexual abuse." *See State v. Reeves*, 216 Neb. 206, 226, 244 N.W.2d 433, 447 (1984).

[5]The jury in Mr. Reeves' case was instructed that intent to kill is conclusively presumed from the intent to commit the underlying felony. The Eighth Circuit declined to find this instruction violated *Sandstrom v. Montana*, 442 U.S. 510 (1979). *Reeves v. Hopkins*, 102 F.3d 977, 985-986.

Court noted, is to place undue pressures upon the court, given the realities of contemporary public sentiment. *Id.* at 646.[6]

The decision of the court below represents no misapplication of this Court's precedent, as the petitioner suggests. Rather, it is a well-reasoned application of *Beck*, which sought to remedy precisely the circumstances of this case:

> Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction.

Id. at 634 (quoting *Keeble v. United States*, 412 U.S. 205, 208 (1971). By depriving the jury of a "third option," the state deprived Mr. Reeves of the full benefit of the reasonable doubt standard. *Beck*, 447 U.S. at 634.

It is difficult to conceive of a case in which *Beck*'s principle is more clearly implicated. This was a grisly and terrifying crime, but it was committed by a man who, though perhaps not legally insane, was clearly not in his right mind. Althought the evidence of that fact would have supported lesser-included offenses in any other kind of case, Nebraska's blanket prohibition of such instructions in felony murder cases gave the jury no option but to convict of capital murder, or set the defendant free. Just as in *Beck*, jury was reminded of this stark choice

---

[6] For example, Mr. Reeves' sentencing panel inexplicably declined to find the statutory mitigation of intoxication, despite abundant evidence in the record that he was "obviously grossly impaired from intoxication." *Reeves v. Hopkins*, 871 F.Supp. at 1198. Further, the panel declined to weigh as mitigation certain letters it received from what it termed "opponents of the death penalty." The panel failed to note that many of those letters came from friends and relatives of both victims, including the parents of one victim. *Reeves v. Hopkins* 928 F. Supp. 941, 966-972 (D.Neb. 1996).

in the prosecutor's closing argument;[7] the jury understandably chose the only option that insured the defendant would not walk free. The Eighth Circuit correctly held that this was precisely the sort of error-prone process that *Beck* sought to avoid.

B. The Eighth Circuit has announced no new rule in this case.

Petitioner claims the circuit court ruling "creates a 'new rule' under *Teague v. Lane* [489 U.S. 288 (1989)]." Petition at 23. As a preliminary matter, we note that prior to the petition for writ of certiorari, the petitioner has **never** asserted *Teague* in the context of Mr. Reeves' *Beck* claim, in the federal district court or the court of appeals, including in his petition for rehearing with suggestion for rehearing en banc. Mr. Reeves, on the other hand, has asserted a *Beck* violation at every level of litigation, from pre-trial onward. Petitioner therefore should be deemed to have waived the *Teague* bar to the retroactive application of a new rule, just as any other affirmative defense would be waived for failure to assert it in a timely fashion. *E.g. Schiro v. Farley*, 510 U.S.222, 228-229 (1994) (State's *Teague* argument will not be entertained as it was not raised in brief in opposition to certiorari); *Hanrahan v. Greer*, 896 F.2d 241 (7th Cir. 1990) (state waived application of *Teague* doctrine by failing to assert it in district court).

In any event, *Teague*, which bars retroactive application of a new rule in a habeas corpus action, is inapposite here. "A case announces a new rule if the result was not dictated by precedent existing at the time a defendant's conviction became final." *Teague*, 489 U.S. at 301. As the respondent has demonstrated herein, *supra*, the Eighth Circuit decision is nothing more

[7]Beck's jury was told that if Beck was acquitted, "'he must be discharged' and 'he can never be tried for anything that he ever did to [the victim].'" *Beck*, 447 U.S. at 630. Mr. Reeves' jury was told essentially the same thing, notwithstanding his defense of insanity. *See supra* n.1.

than a straightforward application of the well-established rule of *Beck*.[8] It is not a new rule. The *Beck* decision was announced June 20, 1980, several months prior to Mr. Reeves' trial. Application of *Beck* in his case is by no means retroactive.

Even assuming *arguendo* the Eight Circuit decision *had* announced a new rule, under *Teague*, an exception to the doctrine of non-retroactivity would apply. *Teague* allows an exception for "'watershed rules of criminal procedure' implicating the fundamental fairness and *accuracy* of the criminal proceeding." *Saffle v. Parks*, 494 U.S. 484, 495 (1990) (emphasis added). At the core of *Beck* is the need for accuracy in the guilt determination: "In the final analysis the difficulty with the Alabama statute is that it interjects irrelevant considerations into the factfinding process. . . ." *Id.* at 642.. As this Court later stated, "[t]he goal of the *Beck* rule . . . is to eliminate the distortion of thte factfinding process that is created when the jury is forced into the all-or-nothing-choice between capital murder and innocence." *Spaziano*, 468 U.S. at 455 (cited in *Reeves*, Appendix at 7-8). The Eighth Circuit's application of *Beck* in this case fits foursquare into the *Teague* exception.

II.

NO SPLIT OF AUTHORITY EXISTS AMONG THE CIRCUIT COURTS OF APPEAL

The petitioner asserts that the Eighth Circuit decision below has created a direct

[8]The Eighth Circuit observed that the only difference between *Beck* and this case was immaterial: In *Beck*, the ban on lesser included offense instruction in capital cases was found in statute; in Nebraska, the ban is found in Nebraska caselaw. Either way, the law forbid instruction on a lesser-included offense even when, in Beck and in this case, the evidence warranted it. Appendix at 9.

split of authority with the Ninth Circuit opinion in *Greenawalt v. Ricketts*, 943 F.2d 1020 (9th Cir. 1991). The fact is, however, no split of authority exists. The Eighth Circuit did, as the petitioner asserts, disapprove the district court's reliance on *Greenawalt*. Appendix at 9. But *Greenawalt* does not present the issue as does *Reeves*. While Randy Greenawalt was charged solely on a felony-murder theory as to four homicides, he also was charged separately with each of the underlying felonies, including two counts of armed robbery, three counts of kidnapping, and one count of theft of a motor vehicle. He was found guilty on all counts. *State v. Greenawalt*, 128 Ariz. 150, 624 P.2d 828 (1981). The jury was not faced with the death-or-acquit dilemma sought to be avoided by *Beck*. *See Villafuerte v. Stewart*, No. 93-99015 (9th Cir. April 11, 1997), *substituted for Villafuerte v. Lewis*, 75 F.3d 1330, *withdrawn* (9th Cir. 1996), (declining to find a *Beck* violation in capital felony murder conviction because the jury was instructed on felonies in addition to murder and so "the all-or- nothing situation found intolerable in *Beck* was not present here." *Id.*, Slip op. at 5-6). The petitioner's contention that the Eighth Circuit opinion conflicts with the Ninth Circuit in *Greenawalt* is illusory.

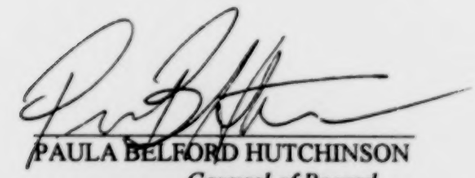
The courts of appeal, including the Eighth and Ninth Circuits, have repeatedly recognized that providing the jury with this all-or-nothing choice contravenes *Beck*. *Williams v. Armontrout*, 912 F.2d 924 (8th Cir. *en banc*1990); *Vickers v. Ricketts*, 798 F.2d 369 (9th Cir. 1986), *cert denied*, 479 U.S. 1054 (1987) (Kennedy, J.) (insanity defense does not satisfy the "third option" required by *Beck*); *Cordova v. Lynaugh*, 838 F.2d 764, 767 (5th Cir. 1988) (*Beck* violation arising out of trial court's refusal to give lesser-included offense instruction). When presented with appropriate facts, the courts of appeal recognize and correctly apply this Court's teaching in *Beck*.

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

RANDOLPH K. REEVES, Respondent



BY: PAULA BELFORD HUTCHINSON
Counsel of Record
5815 South 58th Street, Suite C3
Lincoln, Nebraska 68516
Tel: (402) 420-2156

KENT E. GIPSON
PUBLIC INTEREST
LITIGATION CLINIC
5319 Rockhill Road
Kansas City, MO 64110
Tel: (816) 363-2795

COUNSEL FOR RESPONDENT

No. 96-1693

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

STATE OF NEBRASKA,
PETITIONER,

-VS-

RANDOLPH K. REEVES,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

GRANT WOODS
ATTORNEY GENERAL

PAUL J. McMURDIE
CHIEF COUNSEL
CRIMINAL APPEALS SECTION

BRUCE M. FERG
ASSISTANT ATTORNEY GENERAL
(COUNSEL OF RECORD)
400 W. Congress, Bldg. S-315
TUCSON, ARIZONA 85701-1367
TELEPHONE: (520) 628-6504

ATTORNEYS FOR AMICUS CURIAE

29 pp

Frankie Sue Del Papa
Attorney General
State of Nevada
Capitol Complex
Carson City, Nevada 89710

Gale A. Norton
Attorney General
State of Colorado
1525 Sherman Street, 5th Floor
Denver, Colorado 80203

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF THE AMICUS CURIAE

The State of Arizona, through its Attorney General, respectfully offers this brief as Amicus Curiae in support of the Petitioner, the State of Nebraska. The law of Arizona, like that of Nebraska, provides for imposition of the death penalty even if culpability is found on the basis of the commission of felony murder, rather than premeditated murder. The law of Arizona holds that no lesser-included offenses exist to felony murder, so that no instructions on "lesser included offenses" may properly be given to a charge of felony murder, and the validity of proceeding in this matter, even in a case where the death penalty was imposed, was upheld in *Greenawalt v. Ricketts*, 943 F.2d 1020, 1029 (9th Cir. 1991), *cert. denied*, 506 U.S. 888 (1992).

However, the Eighth Circuit's decision in this case explicitly rejects *Greenawalt*, declaring that in *Greenawalt* the Ninth Circuit misunderstood *Beck v. Alabama*, 447 U.S. 625 (1980). Hence, so long as the glaring contradiction which exists between the understandings of *Beck* enunciated in *Greenawalt* and *Reeves v. Hopkins*, 102 F.3d 977, 982 (8th Cir. 1996) is allowed to continue

unresolved, a troublesome shadow is cast over the validity of numerous Arizona death penalty cases already completed, as well as upon all potential death penalty cases which might be tried on a felony murder theory in the future. The conflict between *Reeves* and *Greenawalt* will undoubtedly spawn further litigation until it is resolved, in every state with a similar felony murder doctrine, so that amicus (and other jurisdictions) possesses a profound and continuing interest in the resolution of the issue presented by Nebraska's petition.

SUMMARY OF ARGUMENTS

The Eighth Circuit ruled in this case that *Beck* had been violated because no lesser offense instructions were given to Reeves' jury, even though Nebraska law does not recognize the existence of any lesser-included offenses to the felony murders with which Reeves was charged. The Eighth Circuit so held, despite its acknowledgment of directly contradictory authority from another circuit, *Greenawalt*, on the basis that the court in *Greenawalt* misunderstood this Court's holding in *Beck*. Not only does this create an intercircuit split of authority, but it is plain that the Eighth

Circuit has itself misread *Beck*, ignoring the crucial fact that *Beck* was decided as it was because Beck's jury was involved in sentencing him as well as determining his guilt or innocence, while the Nebraska jury that convicted Reeves (like the Arizona jury that convicted Greenawalt) was completely unconcerned with the sentence, which was imposed exclusively by judges. Thus, the Eighth Circuit's opinion in this case is plainly wrong and introduces a serious element of uncertainty into every death penalty case tried under a felony murder theory in Nebraska, Arizona (the state of origin of *Greenawalt*), and any other state with a similar felony murder doctrine.

Moreover, the Eighth Circuit (aside from its error on the merits) erred in effectively establishing and retroactively applying a new rule of criminal procedure in a habeas corpus case, in direct contradiction of the rule of *Teague v. Lane*, 489 U.S. 288 (1989). The facts of this case (judge sentencing as opposed to jury sentencing) are so far afield from the holding of *Beck* that the Eighth Circuit's holding certainly constitutes a "new rule," but that new rule fits within neither of the two narrow exceptions permitted by

Teague. Hence, even if the Eighth Circuit's rule were substantively correct (which it is not), it was improper to announce and apply it in this habeas case. Therefore, this Court should grant Nebraska's petition for a writ of certiorari and reverse the Eighth Circuit's action in this case, on both of the grounds stated above.

ARGUMENTS IN SUPPORT OF GRANTING THE PETITION

I

THE EIGHT CIRCUIT'S DISAGREEMENT WITH THE RESOLUTION OF AN INDISTINGUISHABLE *BECK* ISSUE IN *GREENAWALT V. RICKETTS* IS PLAINLY WRONG, AND CREATES CONFUSION ABOUT THE PROPER UNDERSTANDING OF *BECK*, WHICH CAN ONLY BE REMEDIED BY THIS COURT'S GRANT OF CERTIORARI.

In *Beck*, this Court concluded that the giving of lesser-included offense instructions is, under some circumstances, constitutionally required in a capital case. Subsequently the Ninth Circuit applied *Beck* to a capital felony murder case from Arizona, holding that failure to give a lesser-included offense instruction was not error, because Arizona law does not recognize any lesser-included offenses to felony murder. *Greenawalt*:

> Greenawalt contends that the trial court erred by failing to instruct the jury on second degree murder or any

> lesser included offense. He correctly observes that due process requires such an instruction when the evidence warrants it. *Beck v. Alabama*, 447 U.S. 625, 636–37, 100 S. Ct. 2382, 2389, 65 L. Ed. 2d 392 (1980). He fails to point out the Supreme Court's subsequent clarification that "[w]here no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the process. *Beck* does not require that result." *Spaziano v. Florida*, 468 U.S. 447, 455, 104 S. Ct. 3154, 3159, 82 L. Ed. 2d 340 (1984).
>
> Greenawalt was tried solely for felony murder, a crime for which Arizona law recognizes no lesser included offense. *Greenawalt I*, 128 Ariz. at 168, 624 P.2d at 846. . . . Here, the trial court committed no error.

When the same issue arose in this case, however, the Eighth Circuit explicitly rejected the *Greenawalt* decision. It accepted that, under Nebraska law (as under Arizona law), there are no lesser-included offenses in a felony murder case. *Reeves*, 102 F.3d at 982. It also noted that Nebraska had requested it to follow *Greenawalt*, but expressly refused to do so, stating that, "We cannot agree with [*Greenawalt's*] interpretation of the *Beck* doctrine," and accusing the Ninth Circuit of misunderstanding *Beck* and subsequent cases from this Court clarifying *Beck*. *Id.* at 982–83. Applying its own understanding of *Beck*, the Eighth Circuit concluded that giving of lesser offense instructions *was* constitutionally required in Reeves'

case by *Beck*, and granted habeas corpus relief. Thus, a starkly defined intercircuit split now exists, which potentially affects scores of capital cases.[1]

The plain fact is that *Reeves* was wrongly decided, because of its grievous misunderstanding of *Beck* and its progeny. This Court was careful in *Beck* to emphasize that the circumstances of that case were *sui generis*: "Alabama's failure to afford capital defendants the protection provided by lesser included offense instructions is *unique* in American criminal law." 447 U.S. at 635 (emphasis added). Alabama ordinarily permitted the giving of any lesser-included offense instructions which were supported by the evidence, and it was not disputed that, under general Alabama law, felony (non-capital) murder would have constituted a proper lesser-included offense of intentional (capital) murder. *Id.* at 630 n.5, 627–28.

---

1. It is evident that the split will not be resolved by the Ninth Circuit receding from the understanding of *Beck* expressed in the *Greenawalt* decision quoted in the text. Shortly after the Eighth Circuit panel decided *Reeves*, Randy Greenawalt reached the end of his own litigation and argued to the Ninth Circuit that it should reconsider the *Beck* issue in light of *Reeves*. The Ninth Circuit stated that, "*Reeves* does not persuade us that we erroneously resolved Greenawalt's *Beck* claim." *Greenawalt v. Stewart*, 105 F.3d 1268, 1276 (9th Cir. 1997). Nor was this Court sufficiently persuaded that the Ninth Circuit was in error on this point to grant Greenawalt's petition for certiorari which questioned it. 117 S. Ct. 794 (1997).

Moreover, the prosecution acknowledged that evidence existed in Beck's case which would have supported the felony murder instruction. *Id.* at 629–30. However, Beck's jury was not given that option, because of a peculiar statute which specifically precluded the giving of lesser-included offense instructions in capital murder cases. *Id.* at 628 and n.3, 630.

This meant that the jury, which was led by its instructions to believe that it was the actual sentencer (although, in fact, the trial court had the final word on the sentence and could impose either life or death, regardless of what the jury concluded—*id.* at 639 and n.15, understood that it was presented with a stark either/or situation: convict of capital murder and impose the death penalty or acquit altogether. "[T]he jury was told that if petitioner was acquitted of the capital crime of intentional killing in the course of a robbery, he 'must be discharged' and 'he can never be tried for anything that he ever did to [the victim]'." *Id.* at 630.

The absence of any third option created two equally unacceptable but competing emotional pressures on Beck's jury: acquit even if they believed that the defendant was guilty of a serious

offense, but not such an offense that they felt the death penalty was appropriate; convict even if they were not convinced that the capital crime had been proved, so that a clearly guilty defendant would not escape all punishment. The result of these conflicting influences was that "in every case they introduce a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." *Id.* at 642–43. "[T]he failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction." *Id.* at 637. "Thus, the Alabama statute makes the guilt determination depend, at least in part, on the jury's feelings as to whether or not the defendant deserves the death penalty, without giving the jury any standards to guide the decision on this issue." *Id.* at 640.

This concern for the reliability of the *jury's* determination of *guilt*, undistorted by the very different considerations relating to whether or not death is an appropriate sentence, is the linchpin of *Beck*: "Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the

jury in a capital case." *Id.* at 638. And it is precisely this fundamental point which critically distinguishes *Beck* from *Reeves* (and from *Greenawalt* as well). Randolph Reeves was convicted by a jury whose sole concern was guilt or innocence (and which the trial record should reflect was instructed that it was not even to consider the possible penalties which might result from conviction). He then was sentenced in a completely separate proceeding by a panel of three judges, not by the jury. *Reeves*, 102 F.3d at 978–79.

Thus, *Beck's* determinative factor—sentencing by the same jury which decided on guilt—was not even present in Reeves' case.[2] However, the Eighth Circuit utterly failed to perceive the significance of the difference between jury sentencing which occurred in *Beck*, and judge sentencing which occurred in *Reeves*, as indicated by its sole mention of Nebraska's argument that Reeves'

2. Greenawalt, more like Reeves than like Beck, was sentenced by the trial judge. See former A.R.S. § 13-454(A), now renumbered as A.R.S. § 13-703(B), which establishes the role of the judge in Arizona's capital sentencing procedure. Arizona jurors neither have nor believe they have any role in the determination of sentence, even in capital cases. *See, e.g., State v. Martinez-Villareal*, 145 Ariz. 441, 449, 702 P.2d 670, 678, *cert. denied*, 474 U.S. 975 (1985) (veniremen may be voir dired concerning views on death penalty, even though jury's only function is determination of guilt, to insure ability to decide case in accordance with oath and instructions).

jury was not involved in his sentencing: "This case is like *Beck*: the jury had no ultimate control over the imposition of a death sentence and could only choose to convict Reeves of a death-eligible crime or to acquit him." 102 F.3d at 985 n.13. Completely absent is recognition of the fact that the *Beck* jury *believed* that it *did* have "ultimate control over the imposition of sentence": "The jury is not told that the judge is the final sentencing authority. Rather, the jury is instructed that it must impose the death sentence if it finds the defendant guilty and is led to believe, by implication, that its sentence will be final." 447 U.S. 639 n.15. It was that ultimately incorrect belief concerning the jury's power over sentence which gave rise to the competing but extraneous emotional factors described earlier (see 447 U.S. at 642–43), and which was the downfall of the Alabama scheme: "In the final analysis the difficulty with the Alabama statute is that it interjects irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime." *Id.* at 642. However, no such confusion

could have occurred in Reeves' case, because he was sentenced, not by the guilt-phase jury, but in a completely separate proceeding before a panel of judges. Thus, the Eighth Circuit's *Beck* analysis misconceives the very crux of *Beck*.

Moreover, that is not the end of the Eighth Circuit's analytical errors. Any hint that a trial court must provide a third option to the jury where none would otherwise exist, just because the case is capital in nature, is conspicuously absent from *Beck*. "We do not read *Beck* or any other case as establishing a constitutional requirement that states create a noncapital murder offense for every set of facts under which a murder may be committed." *Hatch v. State of Oklahoma*, 58 F.3d 1447, 1454 (10th Cir. 1995), *cert. denied*, 116 S. Ct. 1881 (1996). In pointing to cases from states other than Alabama which permitted the giving of lesser-included offense instructions in appropriate circumstances, this Court in *Beck* cited *State v. Valencia*, 121 Ariz. 191, 589 P.2d 434 (1979). 447 U.S. at 636 n.12. *Valencia* was a capital murder case, charged as felony murder, in which the trial court's refusal to give a second degree murder instruction was affirmed because the evidence showed

that the killing occurred in the course of one of the felonies enumerated in the murder statute. 121 Ariz. at 198, 589 P.2d at 441. *State v. Greenawalt*, 128 Ariz.150, 168, 624 P.2d 828, 846 (1981) quotes that portion of *Valencia*, holding that second degree murder instructions were not required in his case either. Thus, *Beck* itself strongly implies that the Ninth Circuit *Greenawalt* opinion was correct: this Court did not intend for *Beck* to reach situations like those in *Valencia* and this case, where under the ordinary terms of state law there simply do not exist any lesser-included offenses.

This understanding of what *Beck* really means is buttressed by this Court's subsequent cases applying it. In dealing with another case from Alabama, it emphasized that, "Our holding in *Beck*, like our other Eighth Amendment decisions in the past decade, was concerned with insuring that *sentencing discretion* in capital cases is channeled so that arbitrary and capricious results are avoided." *Hopper v. Evans*, 456 U.S. 605, 611 (1982) (emphasis added). But this means that "a lesser included offense instruction [need] be given *only* when the evidence warrants such an instruction." 456 U.S. at 611 (emphasis in original). If consideration of a lesser-included

offense is barred simply because the ordinary law of the state does not provide for one (as opposed to the situation in *Beck*, where the ordinary law did provide for the existence of lessers, but the preclusion statute *forbade application* of that ordinary law in the capital case), there is nothing which the trial evidence can support, and no constitutional requirement of an instruction on a non-existent lesser offense. This was made explicit in *Spaziano v. Florida*, 468 U.S. 447 (1984):

> Petitioner would have us divorce the *Beck* rule from the reasoning on which it was based. The element the Court in *Beck* found essential to a fair trial was not simply a lesser included offense instruction in the abstract, but the enhanced rationality and reliability the existence of the instruction introduced into the jury's deliberations. *Where no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the process. Beck does not require that result.*

468 U.S. at 455 (emphasis added). Thus, where otherwise available lesser-included offenses did not exist, because the statute of limitations had run and the defendant refused to waive the limitations defense, *Beck* did not require the trial court to trick the jury by giving instructions on lesser includeds for which no conviction could actually occur. *Id.* at 456.

Reeves, despite its disclaimers, does precisely what this Court said must not be done—distort *Beck* into a mandate that the state courts either create non-existent lesser-included offenses or refuse to impose a death sentence. To apply such warped reasoning to a case from Nebraska is particularly perverse (another "divorc[ing of] the *Beck* rule from the reasoning on which it was based) because the whole rationale for *Beck* was the problem of a *jury* making irrational *sentencing* decisions as a result of the unique interplay of Alabama's statutes. "[T]he Court in *Beck* identified the chief vice of Alabama's failure to provide a lesser included offense option as deflecting the jury's attention from 'the *central issue* of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime'." *California v. Ramos*, 463 U.S. 992, 1007-08 (1983) (emphasis added by Court). As acknowledged even by the Eighth Circuit, capital sentencing in Nebraska is done by the panel of judges alone, so the rationale for *Beck* simply does not apply to Nebraska cases; the jury cannot have its attention "deflected from" the issue of guilt by concern about how that determination may impact on sentence, because the jurors

have no part in sentencing. *Reeves*, which did not involve jury sentencing, completely misplaced its reliance on *Beck*.

Finally, *Reeves* also is seriously defective in its insupportable conflation of *Beck* with *Enmund v. Florida*, 458 U.S. 782 (1982). *See* 102 F.3d at 984–85. *Beck* problems were specifically classified by this Court as "deficiencies in the jury's finding as to the guilt or innocence of a defendant," which cannot be cured by subsequent judicial action, in express contrast with *Enmund* findings, which can be made by judges, and at any level of the state process: "But our ruling in *Enmund* does not concern the guilt or innocence of the defendant—it establishes no new elements of the crime of murder that must be found by the jury." *Cabana v. Bullock*, 474 U.S. 376, 384–85 (1986). Thus, the analyses are quite separate, and the fact that in a given case the prosecution may not need to seek lesser-included offense instructions under *Beck*, because it proceeded under a felony murder theory which meant that no lessers existed, does not mean that it is "avoiding" *Enmund* (as *Reeves* pejoratively phrases it) when it produces evidence of the defendant's intent at sentencing

—that is allowing the safeguard which *Enmund* was intended to be to operate.

The Eighth Circuit has created a plain intercircuit split of interpretation of *Beck*, which necessarily spawns confusion over the correct understanding of a decision of this Court which is crucial to scores of death penalty cases. The Eighth Circuit's denial of rehearing en banc shows that the conflict can only be resolved by this Court. Nebraska's petition for certiorari should be granted, and the erroneous decision in this case should be reversed.

II

THE HOLDING HERE ESTABLISHES AND APPLIES A NEW RULE, CONTRARY TO *TEAGUE*, REQUIRING THAT CERTIORARI BE GRANTED TO CORRECT THAT ERROR.

In *Teague*, this Court determined that new rules of criminal procedure must not be retroactively applied in habeas corpus cases, absent either of two exceptions. *Teague* applies in capital cases. *Penry v. Lynaugh*, 492 U.S. 302, 313–14 (1989). In requiring that lesser offense instructions be given under the circumstances of this case, the Eighth Circuit established a new rule of criminal procedure and applied it retroactively to Reeves, in a habeas proceeding. This

is a clear violation of *Teague*, which this Court should grant certiorari to correct, quite aside from the substantive misapplication of *Beck* discussed above.

A. PRESENTATION OF *TEAGUE* ISSUE.

Although it is generally preferable to present all positions to be argued in this Court to the lower court, the *Teague* problem apparently was not noted in Nebraska's pleadings to the Eighth Circuit. This is hardly surprising, since the Eighth Circuit's deviant reading of *Beck* was unknown until the opinion issued (so that there was no reason be concerned with *Teague* before then), and the substantive error is so clear that *rehearing en banc* could reasonably have been expected to be granted without recourse to the more technical *Teague* question.

However, the failure to argue *Teague* to the Eighth Circuit does not preclude this Court from granting certiorari and considering it. *Teague* is raised by the Petition for Certiorari (Question Four). Although *Teague* is not jurisdictional, in the sense that this Court *must* raise the issue and decide it *sua sponte* when certiorari has been granted for some other purpose, *Collins v. Youngblood*, 497 U.S.

37, 41 (1990), whether the state raises "any *Teague* defense at the petition stage is significant." *Schiro v. Farley*, ___ U.S. ___, 114 S. Ct. 783, 789 (1994). Here, Nebraska has argued in its petition that *Teague* applies, and *Teague* "is a necessary predicate to the resolution of the [other] question presented in the petition." *Caspari v. Bohlen*, ___ U.S. ___, 114 S. Ct. 948, 953 (1994). "[I]f the State does argue that the defendant seeks the benefit of a new rule of constitutional law, the court *must* apply *Teague* before considering the merits of the claim." *Id.* (Court considered *Teague* issue despite Eight Circuit's insistence, as here, that it was merely applying existing precedent.). Therefore, having raised *Teague* in its petition to this Court, the first occasion on which it could reasonably be expected to be heard, Nebraska is entitled to a resolution of its *Teague* defense, as well as a decision on the merits of the circuit-splitting *Beck* issue.

B. *REEVES* CREATES A NEW RULE.

The first step in *Teague* analysis is to determine whether a new rule is being established. Although *Beck* came out in 1980, before the Nebraska Supreme Court decided Reeves' appeal in 1984,

"Under this [Court's] functional view of what constitutes a new rule, our task is to determine whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [the defendant] seeks was required by the Constitution." *Saffle v. Parks*, 494 U.S. 484, 488 (1990). Not only *Beck*, but also *Hopper v. Evans* was decided before the Nebraska Supreme Court concluded its review of Reeves' direct appeal, *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984). As discussed earlier, *Beck* called the situation it was addressing "unique in American criminal law," and dealt with a situation where the jury was involved in sentencing, so that its consideration of guilt was subject to being influenced by concerns about what sentence it could impose, a situation wholly different from the circumstances of Reeves' case, where the jury had no connection whatever to the sentencing determination, and thus could not be distracted from its sole task of accurately assessing guilt. *Hopper* emphasized that *Beck* had no application to the situation where (as under the Nebraska view of felony murder) no lesser-included offenses existed upon which an instruction could

legitimately be given. Thus, any reasonable court considering Reeves' appeal, far from feeling compelled to conclude that what eventually became the Eighth Circuit's expansive construction of *Beck* was required by the Constitution, likely would have concluded just the opposite. That a result is not so obvious that a court must feel compelled to reach it can be demonstrated by just the sort of split between jurisdictions which has occurred between the Eighth and Ninth Circuits over this issue. *Butler v. McKellar*, 494 U.S. 407, 415 (1990). Hence, it is plain that, despite its reliance on *Beck*, what the Eighth Circuit has done in this case is indeed to create and apply a "new rule," which goes far beyond anything mandated by *Beck*. *See Lambrix v. Singletary*, No. 96-5658, 1997 WL 235069 (U.S. Jan. 15, 1997) (*Teague* inquiry is whether a jurist considering all the relevant material could reasonably have reached a conclusion contrary to the holding sought to be applied on habeas review).

C. NEITHER OF THE TWO *TEAGUE* EXCEPTIONS APPLY.

Teague allowed for two exceptional situations in which creation of a retroactive new rule would be permitted in a habeas proceeding:

> Under the first exception, "a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe'." This exception is clearly inapplicable. The proscribed conduct in the instant case is capital murder, the prosecution of which is, to put it mildly, not prohibited by the rule in [*Reeves*]. Nor did [*Reeves*] address any "categorical guarantees accorded by the Constitution" such as a prohibition on the imposition of a particular punishment on a certain class of offenders.

Butler v. McKellar, 494 U.S. at 415 (discussing retroactivity of new rule of *Arizona v. Roberson*, 486 U.S. 675 (1988) (citations omitted). As demonstrated by the insertion of *Reeves* into this quotation discussing another case, the first *Teague* exception obviously does not apply here, because the proscription of murder is not altered.

"The second *Teague* exception applies to new 'watershed rules of criminal procedure' that are necessary to the fundamental fairness of the criminal proceeding." *Sawyer v. Smith*, 497 U.S. 227, 241–42 (1990). Although *Beck* sought to enhance the reliability of capital proceedings, and that presumably is also the intention of the Eighth Circuit's extension of *Beck* in this case, this Court pointed out in *Sawyer* that, "A rule that qualifies under this exception must

not only improve accuracy, but also 'alter our understanding of the *bedrock procedural elements*' essential to the fairness of a proceeding." *Id.* at 242 (emphasis in original). That the new rule promulgated by the Eighth Circuit in *Reeves* (that lesser offense instructions must always be given in a capital case, even if not provided for by state law and even if the sentencing is not done by the jury) does not qualify is shown by several facts: that this Court has never held lesser-included offense instructions to be constitutionally required in non-capital cases, *Beck*, 447 U.S. at 638 n.14; that the giving of lesser-included offense instructions arose as an aid to, and often is considered more beneficial to, the prosecution, *id.* at 633; *Spaziano*, 468 U.S. at 456; and that this Court found no contradiction of the "general premise that a criminal defendant may not be required to waive a substantive right as a condition for receiving an otherwise constitutionally fair trial" in holding that Spaziano was properly required to elect between waiving his statute of limitations defense and receiving lesser-included offense instructions in his capital case. 468 U.S. at 455–57. Obviously, no "bedrock procedural element essential to the

fairness of a proceeding" is this newly-minted rule of the Eighth Circuit's. Hence, it does not fall within either of the two *Teague* exceptions, and there is no persuasive reason why *Teague* should not be applied to this case.

CONCLUSION

Based on the foregoing authorities and arguments, Amicus Curiae respectfully requests this Court to grant Nebraska's petition for writ of certiorari and reverse the judgement of the Eighth Circuit in this case. That court's decision is fundamentally flawed, not only in its misreading of *Beck*, but in creating a new rule and applying it retroactively to Reeves in clear contravention of the rule of *Teague*. Thus, no matter how the case is analyzed, it cries out for the corrective action which is available only through this Court's exercise of certiorari.

Respectfully submitted,

GRANT WOODS
Attorney General

PAUL J. McMURDIE
Chief Counsel
Criminal Appeals Section

BRUCE M. FERG
Assistant Attorney General
Attorneys for Amicus Curiae

[13689]

(3)

No. 96-1693

In The

Supreme Court of the United States

October Term, 1997

FRANK X. HOPKINS, Warden,
Nebraska State Penitentiary,

Petitioner,

v.

RANDOLPH K. REEVES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX

DON STENBERG
Attorney General

J. KIRK BROWN
Counsel of Record
Assistant Attorney General
P.O. Box 98920
Lincoln, Nebraska 68509-8920
Tel: (402) 471-2682

Counsel for Petitioner

PAULA B. HUTCHINSON
Counsel of Record
5815 South 58th Street
Lincoln, NE 68519
(402) 420-2156

KENT E. GIBSON
5319 Rockhill Road
Kansas City, MO 64110
(816) 363-2795

TIMOTHY K. FORD
MACDONALD, HOAGUE & BAYLESS
1500 Hoge Building
705 Second Avenue
Seattle, WA 98104-1745
(206-622-1604

Counsel for Respondent

Petition For Certiorari Filed April 23, 1997
Certiorari Granted September 29, 1997

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

67pp

INDEX

INDEX – Continued

RELEVANT DOCKET ENTRIES

April 1, 1981: The respondent is found guilty by a jury of two counts of first-degree murder, case found at Docket 56, Page 139 in the District Court of Lancaster County, Nebraska.

September 11, 1981: A three-judge panel sentences the respondent to death.

January 20, 1984: The Supreme Court of Nebraska affirms the respondent's convictions and sentences. State v. Reeves, 216 Neb. 206, 344 N.W.2d 433 (1984).

November 13, 1984: The Supreme Court of the United States denies certiorari. Reeves v. Nebraska, 469 U.S. 1028 (1984).

November 13, 1990: The Supreme Court of the United States remands the cause to the Supreme Court of Nebraska for further consideration in light of Clemons v. Mississippi, 494 U.S. 738 (1990). Reeves v. Nebraska, 498 U.S. 964 (1990).

November 8, 1991: The Supreme Court of Nebraska balances the aggravating and mitigating circumstances anew and determines that sentences of death remain the appropriate penalties. State v. Reeves, 239 Neb. 419, 476 N.W.2d 829 (1991).

October 5, 1992: The Supreme Court of the United States denies certiorari. Reeves v. Nebraska, 506 U.S. 837 (1992).

December 26, 1996: A unanimous three-judge panel of the United States Court of Appeals for the Eighth Circuit grants the respondent a conditional writ of habeas corpus. Reeves v. Hopkins, 102 F.3d 977 (8th Cir. 1996), *reh'g denied* February 27, 1997.

PRELIMINARY JURY
INSTRUCTION # 10

INSTRUCTION NO. 10

You will have nothing whatsoever to do with the punishment or disposition of the defendant in the event of his conviction. Therefore, in determining whether he is guilty or innocent, you have no right to take into consideration what punishment or disposition he may or may not receive in the event of his conviction.

GIVEN

/s/ D.E.D.
JUDGE DISTRICT COURT

(Found at page 207 of the Nebraska Supreme Court Transcript)

• • •

[2060] Instruction Number 3 starts out, "The Information or the fact that the county attorney has filed an Information is not to be considered by you as evidence."

MR. LAHNERS: No objection.

MR. GOOS: No objection.

THE COURT: Instruction Number 4 sets out that the defendant is presumed to be innocent.

MR. LAHNERS: No objection, your Honor.

MR. GOOS: No objection.

THE COURT: The next one is mislabeled. It should be Number 5. The Court is rejecting the proposed Instruction Number 1 and Number 2 of the defendant to instruct the jury in regard to degrees of murder and manslaughter. The Court, in doing so, is taking into consideration the following cases: State v. Harris, State v. McDonald – Harris is 194 Neb. 74; State v. McDonald, 195 Neb. 625; State v. Casper, 192 Neb. 120; Garcia v. State, 159 Neb. 571; State v. MacAvoy, 144 Neb. 827. And none of those cases, they all being – and the Court has read State v. Montgomery, 191 Neb. 470. In all of those cases except the Montgomery case, the Court held that those were all cases that – homicides during the commission of the felony, and instructions were not given in some of those cases. It was ruled on specifically by the Supreme Court. In Montgomery v. State, there is some [2061] dicta to the effect that if the facts and circumstances permit that, and the evidence permits it, that it might be appropriate to give an instruction under certain conditions. And the Court finds that those conditions do not exist in

this case. Therefore, defendant's requested Instruction Number 2 is refused. Defendant's requested Instruction Number 1 is refused.

Okay. Now, the next one has been misnumbered, and that should be Number 5 instead of Number 4. And they will be consecutively misnumbered from here on out.

MR. GOOS: Your Honor, I wonder if I might be permitted to state the objections to – for the Defense to Instruction Number 5 –

THE COURT: You may do so.

MR. GOOS: As is proposed, or if the Court would prefer, I could wait until the end.

THE COURT: You may do so at the end, if you desire. That would be Instruction Number 5.

MR. GOOS: Yes.

THE COURT: Yes. We'll wait and come back to that.

MR. GOOS: All right.

THE COURT: I'm assuming that some of the grounds are that the Court is not instructing on the first degree, second degree, and manslaughter.

* * *

[2097] THE COURT: Anything else, Mr. Lahners?

MR. LAHNERS: Not on number 5.

THE COURT: It's satisfactory with the State?

MR. LAHNERS: Yes, sir.

THE COURT: Satisfactory with the defendant?

MR. GOOS: Well, Your Honor, it is with two exceptions.

THE COURT: All right.

MR. GOOS: First of all, I think to be consistent with the motion to strike which we filed against the Amended Information on the theory that there were really two crimes alleged in each count that we should object to it on the grounds that it does set out two crimes and that they should be separately numbered and stated. And secondly we object to the instruction because it does not include lesser offenses.

THE COURT: Any other objections?

MR. GOOS: No.

THE COURT: They are overruled.

MR. GOOS: Your Honor, could I state more fully –

THE COURT: Oh, you certainly may. You just go right to it.

MR. GOOS: I guess what I am stating now would be my objections to Instruction Number 5 for failing to include the lesser included offenses of second degree murder and manslaughter, [2098] and also I would ask the Court to take them as statements in support of our request that the Court grant Instructions Number 1 and 2 which were requested by the defense.

THE COURT: The Court has duly noted them and the objection is overruled. Do you want to explain anything else?

MR. GOOS: Well, I wanted to give the reason why –

THE COURT: You can give your reasons, go ahead.

MR. GOOS: One, we feel that by not including lesser included the defendant is deprived of his theory of the case. That is, he's deprived of a right to show or argue to the jury that he could not have been guilty of felony murder involving an attempted first degree sexual assault and therefore that he might be guilty of a lesser crime. For example, second degree murder or manslaughter.

Two, we submit the Court is disregarding the evidence that defendant could act intentionally at the time of the crimes including an intent to stab or use force. Three, that the defendant has been or will be deprived of a fair trial in that under the charges against the defendant in the Information intent and use of force were material elements and are material elements. And both defendant and the State have produced evidence on intent. The defendant has conceded the use of force. That is stabbing. And he has conducted his defense in light of those facts in the belief, now [2099] apparently erroneous, that a lesser included offense would be required in light of allegations contained in the Information as amended and upon which trial was had.

Four, defendant will be denied a fair trial and due process of law by virtue of all those matters just stated.

Five, we submit the Court is disregarding the fact that if all previous felony murder cases decided by the Nebraska Supreme Court there was no specific intent charge whereas in this case there was. And in addition in this case I think there are – is a general intent charge.

Six, we believe the Court is failing to take into account basic substantive changes in Nebraska law since past Supreme Court decisions on felony murder insofar as lesser included offenses are concerned. For example, the enactment of a different sexual – a different second degree murder statute, one containing no elements of malice and also the enactment of comprehensive statute on the inchoate crime of attempt which contains specific elements of intent that were, of course, set out in the Amended Information upon which trial was had.

Seven, the Court is, in effect, by refusing the lesser included offense of second degree murder, finding as a matter of law the defendant could not have intentionally caused the death of the victims by stabbing, and that he did not do so, notwithstanding there is evidence that he may have done so. [2100] Eight, defendant is and will be denied his right to have the facts in this case determined by a jury contrary to this rights under Nebraska statutes and the constitution of the United States and the constitution of Nebraska.

Nine, the Court's ruling and failure to include lesser included offenses is inconsistent with and contrary to the recent Nebraska court decisions. The recently decided cases of Tamburino, State v. Tamburino at 201 Neb. 703, 1978, which expanded the tests to be used in determining whether a lesser included offense should be given. And

also the case of State v. Johnson at 197 Neb. 216, a 1976 case, stating what is a lesser included offense.

Ten, not to give the lesser included offenses will deprive defendant of his right to argue to the jury that the evidence would permit them in this case to rationally infer that the defendant intentionally caused the death of either one or both of the victims.

Eleven, the Court is depriving defendant of the inference that he intentionally assaulted and stabbed either or both victims prior to any intent to sexually assault any person.

Twelve, we believe the failure to give lesser included offenses would, in the words of the case of Beck v. Alabama at 100 Supr. Crt. 2382, 1980, would enhance the risk of an unwarranted conviction.

And lastly we would like to inject an element of [2101] equal protection of the laws here, Judge, because it seems that under the Tamburino case and other similar cases and all criminal cases in this state where the evidence produces a rational basis for a verdict acquitting defendant of the offense charged and convicting him of a lesser charge that, because there is this rule that exists in all other offenses we say that it should exist in this case also and would constitute a denial of the equal protection of the laws.

Your Honor, just by way of argument in support of those, I guess what we are saying is that there is ample evidence in the record that would warrant this Court finding defendant guilty of second degree murder.

There's an absence of premeditation and just this afternoon Dr. Cohen testified that he believed that the defendant acted intentionally when he stabbed the girls and that he acted purposefully and that testimony in and by itself would, we think, warrant the Court in giving a lesser included of second degree murder. And we would earnestly ask the Court to reconsider on the question of whether there should be lesser included offenses given.

THE COURT: Mr. Lahners, any argument?

MR. LAHNERS: No, Your Honor. I think we've been over it pretty well previously.

THE COURT: In regard to the Supreme Court of this state it has held consistently as far as this Court is aware [2102] that when lesser included offenses are given they must contain some, if not all, of the elements or some of the elements charged in the principle offense. For instance, in murder in the first degree there is premeditation, deliberation and malice as well as intent. Second decree [sic] murder in this state only contains intent. Therefore, on a premeditated murder, a second offense instruction, a manslaughter offense instruction is proper. Because manslaughter doesn't require any intent. However, in a felony murder case, which this Court considers this is, no intent is required in the killing where the act charged is murder while in the perpetration or killing while in the perpetration of a specified felony. In this case, sexual assault in the first degree or attempted sexual assault in the first degree. There is no intent required for killing.

If you go to the first degree murder by premeditation, deliberation, and second degree murder, then you

are going – you are putting in the element of intent on the killing. and no intent is required here. Therefore, there is no intent required.

The Court refers to the case of State v. MacAvoy as one of those cases where intent is not required in a murder and the perpetration of a felony. And some of the other cases the Court has researched, all of the cases that have been to the Supreme Court, felony murder, in some of those cases the [2103] court, where the issues is raided, has specifically held that the Court was proper in not granting the request to instruct on second degree murder and manslaughter. The objections are overruled,and Instruction Number 5 will be given in its present form if there's no objection to the form under the Court's theory.

MR. GOOS: Your Honor, there is no objection to the form under the Court's theory.

THE COURT: Yes.

MR. GOOS: I would like to just add one thing, and that is that it's our contention that the information contains a general – an allegation of a general intent when they alleged that he – the defendant intentionally overcame Janet Mesner by force and the force that was used in this case in the words, I think, of Mr. Lahners at an earlier conference in chambers, was part of the stabbing or the stabbing constituted part of force and the Supreme Court did, just recently, say in State v. Duis, D-u-i-s, at 207 Neb. 851, that assault with a dangerous instrument is a general intent crime. And really we believe that second degree murder is a general intent crime and would therefore fit within the context of the

allegations of the Information. I just wanted to add that, if I might.

THE COURT: Very well. The record will so show, and it is overruled.

INSTRUCTION NO. 2

This is a criminal action prosecuted by the State of Nebraska against the defendant, Randolph K. Reeves, upon an Amended Information containing two separate counts filed by the County Attorney of Lancaster County, Nebraska, pursuant to law.

The first count in the Amended Information charges in substance that:

> On or about the 29th day of March, 1980, in Lancaster County, Nebraska, the defendant, Randolph K. Reeves, did kill Janet L. Mesner in the perpetration of or attempt to perpetrate a sexual assault in the first degree against Janet L. Mesner, to-wit: he intentionally engaged in conduct, to-wit: overcame Janet L. Mesner by force, which, under the circumstances as he believed them to be, constituted a substantial step in a course of conduct intended by Randolph K. Reeves to culminate in the crime of overcoming Janet L. Mesner by force and subjecting her to sexual penetration.

The second court of the Amended Information charges in substance that:

> On or about the 29th day of March, 1980, in Lancaster County, Nebraska, the defendant, Randolph K. Reeves, did kill Victoria L. Lamm in the perpetration of or attempt to perpetrate a sexual assault in the first degree against Janet L. Mesner by force and subjected her to sexual penetration; or he intentionally engaged in conduct, to-wit: overcame Janet L. Mesner by force, which, under the circumstances as he believed them to be, constituted a substantial step in a course of conduct intended by Randolph K.

> Reeves to culminate in the crime of overcoming Janet L. Mesner by force and subjecting her to sexual penetration.

To each charge the defendant has entered a plea of not guilty and not guilty by reason of insanity or mental derangement. The charge and the defendant's pleas make up the issues on each count which you will determine by your verdicts.

* * *

INSTRUCTION NO. 5

On Count I of the Amended Information in this case, depending upon the evidence, you may find the defendant:

(a) Guilty of murder in the perpetration of or attempted perpetration of a sexual assault in the first degree; or

(b) Not guilty by reason of insanity or mental derangement; or

(c) Not guilty.

The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime charged in Count I of the Amended Information are:

1. That on or about the 29th day of March, 1980, the defendant did kill Janet L. Mesner in Lancaster County, Nebraska;

2. That the defendant killed Janet L. Mesner while the defendant was:

   (a) Intentionally perpetrating a sexual assault in the first degree upon Janet L. Mesner, to-wit: by Randolph K. Reeves intentionally overcoming Janet L. Mesner by force and by intentionally subjecting her to sexual penetration; or

   (b) Intentionally attempting to perpetrate a sexual assault in the first degree upon Janet L. Mesner by intentionally engaging in conduct, to-wit: overcome Janet L. Mesner by force, which, under the circumstances as he believed them to be, constituted a substantial step in a course of conduct intended by Randolph K. Reeves to culminate in the crime of overcoming Janet L. Mesner by force and subjecting her to sexual penetration.

3. That at the time of killing Janet L. Mesner and at the time of the perpetration of or attempt to perpetrate a sexual assault in the first degree upon Janet L. Mesner the defendant was not insane.

The State has the burden of proving beyond a reasonable doubt each and every one of the foregoing material elements necessary for conviction on Count I of the Amended Information.

The sanity of the defendant must be proved by the State beyond a reasonable doubt. Instruction Number *13* following separately discusses this material element.

If you find from the evidence beyond a reasonable doubt that each of the foregoing material elements of murder in the perpetration of or attempted perpetration of a sexual assault in the first degree is true, it is your duty to find the defendant guilty of the crime of murder in the perpetration of or attempted perpetration of a sexual assault in the first degree on Count I of the Amended Information. On the other hand, if you find the State has failed to prove beyond a reasonable doubt any one or more of the foregoing material elements, it is your duty to find the defendant not guilty on Count I of the Amended Information.

The burden of proof is always on the State to prove beyond a reasonable doubt all of the material elements of the crime charged, and this burden never shifts.

On Count II of the Amended Information in this case, depending upon the evidence, you may find the defendant:

   (a) Guilty of murder in the perpetration of or attempted perpetration of a sexual assault in the first degree; or

   (b) Not guilty by reason of insanity or mental derangement; or

   (c) Not guilty.

The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime charged in Count II of the Amended Information are:

1. That on or about the 29th day of March, 1980, the defendant, Randolph K. Reeves,

did kill Victoria L. Lamm in Lancaster County, Nebraska.

2. That the defendant killed Victoria L. Lamm while the defendant was:

   (a) Intentionally perpetrating a sexual assault in the first degree upon Janet L. Mesner, to-wit: by Randolph K. Reeves intentionally overcoming Janet L. Mesner by force and by intentionally subjecting her to sexual penetration; *or*

   (b) Intentionally attempting to perpetrate a sexual assault in the first degree upon Janet L. Mesner by engaging in conduct, to-wit: overcome Janet L. Mesner by force, which, under the circumstances as he believed them to be constituted a substantial step in a course of conduct intended by Randolph K. Reeves to culminate in the crime of overcoming Janet L. Mesner by force and subjecting her to sexual penetration.

3. That at the time of killing Victoria L. Lamm and at the time of the perpetration of or attempt to perpetrate a sexual assault in the first degree upon Janet L. Mesner the defendant was not insane.

The State has the burden of proving beyond a reasonable doubt each and every one of the foregoing material elements necessary for conviction on Count II of the Amended Information.

The sanity of the defendant must be proved by the State beyond a reasonable doubt. Instruction Number *13* following separately discusses this material element.

If you find from the evidence beyond a reasonable doubt that each of the foregoing material elements of murder in the perpetration of or attempted perpetration of a sexual assault in the first degree is true, it is your duty to find the defendant guilty of the crime of murder in the perpetration of or attempted perpetration of a sexual assault in the first degree on Count II of the Amended Information. On the other hand, if you find the State has failed to prove beyond a reasonable doubt any one or more of the foregoing material elements, it is your duty to find the defendant not guilty on Count II of the Amended Information.

The burden of proof is always on the State to prove beyond a reasonable doubt all of the material elements of the crime charged, and this burden never shifts.

* * *

INSTRUCTION NO. 7

As pertains to the element of sexual assault in the first degree in the alleged offenses herein, an applicable statute of the State of Nebraska provides that any person who subjects another person to sexual perpetration and overcomes the victim by force, . . . is guilty of sexual assault in the first degree.

"Sexual penetration" as used in these instructions means sexual intercourse in its ordinary meaning. Sexual penetration, however slight, is further defined as the actor placing any part of the actor's body into the genital

opening of the victim's body which can be reasonably construed as being for non-medical or non-health purposes. Sexual penetration does not require the emission of semen.

"Actor" means a person accused of a sexual assault.

"Victim" as used in these instructions means a person alleging to have been sexually assaulted.

INSTRUCTION NO. 8

In regard to an alleged attempt to perpetrate a sexual assault in the first degree, the Statutes of the State of Nebraska in full force and effect at the time alleged in the Amended Information provided as follows:

(1) A person shall be guilty of an attempt to commit a crime if he:

(a) Intentionally engages in conduct which, under the circumstances as he believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his commission of the crime of sexual assault in the first degree.

(2) When causing a particular result is an element of the crime, a person shall be guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, he intentionally engages in conduct which is a substantial step in a course

of conduct intended or known to cause such a result.

(3) Conduct shall not be considered a substantial step under this section unless it is strongly corroborative of the defendant's criminal intent.

INSTRUCTION NO. 9

The intent with which an act is done is a necessary element of the crime of:

(a) Sexual assault in the first degree;

(b) Attempted sexual assault in the first degree;

and must be established by the evidence the same as any other material element beyond a reasonable doubt.

Intent is a mental process, and it therefore generally remains hidden within the mind where it is conceived. It is rarely if ever susceptible of proof by direct evidence. It may, however, be inferred from the words and acts of the defendant and circumstances surrounding his conduct. But before that intent can be inferred from such circumstantial evidence alone, it must be of such character as to exclude every reasonable conclusion except that defendant had the required intent. It is for you to determine from all the facts and circumstances in evidence whether or not the defendant committed the acts complained of and whether at such time he had the criminal intent required by instructions Numbers *2, 5, 8, 12, 14*. If you

have any reasonable doubt with respect to either, you must find the defendant not guilty.

INSTRUCTION NO. 10

You are instructed that in a prosecution for homicide in the perpetration of or attempt to perpetrate a sexual assault in the first degree, as herein charged, proof of premeditation and deliberation or an intent to kill is not required.

The turpitude involved in the perpetration of or attempted perpetration of a sexual assault in the first degree takes the place of intent to kill or premeditated malice, and the purpose to kill is conclusively presumed from the criminal intention required for perpetration of or attempt to perpetrate a sexual assault in the first degree.

A homicide committed while perpetrating or attempting to perpetrate a sexual assault in the first degree is murder in the first degree even though no intent to commit homicide is alleged or proven.

INSTRUCTION NO. 11

You are instructed that in order to establish that a homicide was committed in the perpetration of or attempt to perpetrate a sexual assault in the first degree it is not necessary for the State to prove that the homicide

was committed before or during the actual perpetration of or attempted perpetration of a sexual assault in the first degree; a homicide is committed in the perpetration of or attempt to perpetrate a sexual assault in the first degree if it is committed in the res gestae of the perpetration of or attempted perpetration of a sexual assault in the first degree; that is, if the initial crime of perpetration of or attempt to perpetrate a sexual assault in the first degree and homicide were closely connected in point of time, place and causal relation, and were parts of one continuous transaction. It is for the jury to determine from the facts and circumstances in evidence; if these, and all the other essential elements in the case exists, and the same must be established by the State beyond a reasonable doubt.

* * *

INSTRUCTION NO. 13

The defendant contends that he was insane or mentally deranged at the time he is alleged to have committed the offenses charged in the Amended Information. Insanity is a defense recognized by law and the evidence relating thereto should be considered by you and weighed the same as any other evidence.

The burden is upon the State to establish the fact of defendant's sanity beyond a reasonable doubt.

If from all of the evidence you are convinced beyond a reasonable doubt that the defendant committed the act

or acts charged and that at the time of the commission of the alleged crime he was of sufficient mental capacity:

1. To understand what he was doing and the nature and quality of his act;

2. To distinguish between right and wrong with respect to it; and

3. To know that such act was wrong and deserved punishment,

then the defendant would be legally responsible for his acts and you should return a verdict of "guilty", although you might find that at the time he was suffering from some degree of insanity or impairment of the mind.

If from the evidence or lack of evidence in this case a reasonable doubt is raised in your minds as to the defendant's mental capacity at the time of the commission of the alleged crime:

1. To understand what he was doing and the nature and quality of his act; or

2. To distinguish between right and wrong with respect to it; or

3. To know that such act was wrong and deserved punishment,

it is your duty to find the defendant "not guilty by reason of insanity".

INSTRUCTION NO. 14

Ordinarily, voluntary drug intoxication or voluntary alcohol intoxication or a combination thereof is not justification or excuse for crime; but excessive intoxication by which a person is wholly deprived of reason may prevent having the intent charged.

If you find that the defendant was intoxicated, that fact should be considered by you, together with all the facts and circumstances in evidence, for the purpose of determining whether or not you have a reasonable doubt that defendant was at the time in question capable of having the intent charged in regard to the alleged perpetration of or attempt to perpetrate a sexual assault in the first degree.

* * *

INSTRUCTION NO. 16

"Reasonable doubt" is such a doubt as would cause a reasonable and prudent man, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon. It is such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, to a moral certainty, of the guilt of the accused. At the same time absolute or mathematical certainty is not required. You may be convinced of the truth of a fact beyond reasonable doubt and yet be fully aware that possibly you may be

mistaken. You may find an accused guilty upon the strong probabilities of the case, provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable. A reasonable doubt is an actual and substantial doubt reasonably arising from the evidence, from the facts or circumstances shown by the evidence, or from the lack of evidence on the part of the state, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.

* * *

JURY INSTRUCTION # 29

INSTRUCTION NO. 29

You have nothing whatever to do with the punishment or disposition of the defendant in the event of his conviction or acquittal by reason of insanity. Therefore, in determining his guilt or innocence, you have no right to take into consideration what punishment or disposition he may or may not receive in the event of his conviction or in the event of his acquittal by reason of insanity.

GIVEN

/s/ D.E.D.
JUDGE DISTRICT COURT

(Found at page 274 of the Nebraska Supreme Court Transcript)

IN THE DISTRICT COURT
OF LANCASTER COUNTY, NEBRASKA

STATE OF NEBRASKA, Plaintiff	)	Docket 56 Page 139
vs.	)	DEFENDANT'S REQUESTED INSTRUCTION NO. 1
RANDOLPH K. REEVES, Defendant	)	(Filed March 26, 1981)

On Count I of the information in this case, depending on the evidence, you may find the defendant:

a. Guilty of murder in the first degree; or

b. Guilty of murder in the second degree; or

c. Guilty of manslaughter; or

d. Not guilty by reason of insanity; or

e. Not guilty.

the material elements which the state must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime of murder in the first degree are:

1. That the defendant, Randolph K. Reeves, killed Janet Messner;

2. That he did so in the perpetration of a sexual assault in the first degree against her by intentionally overcoming her by force and subjecting her to sexual penetration;

3. That he did so on or about March 29, 1980;

4. That he did so in Lancaster County, State of Nebraska;

5. That at the time of the killing, the defendant, Randolph K. Reeves, was not insane.

The State has the burden of proving beyond a reasonable doubt each and every one of the foregoing material elements of the crime of murder in the first degree necessary for conviction.

The sanity of the defendant must be proven by the State beyond a reasonable doubt. Instruction No. ___ following, separately discusses this material element.

If you find from the evidence beyond a reasonable doubt that each of the foregoing material elements is true, it is your duty to find the defendant guilty of the crime of murder in the first degree. On the other hand, if you find that the State has failed to prove beyond a reasonable doubt one or more of the foregoing material elements, it is your duty to find the defendant not guilty of the crime of murder in the first degree.

-B-

Alternatively, with respect to Count I of the information, depending on the evidence, you may find the defendant:

a. Guilty of murder in the first degree; or

b. Guilty of murder in the second degree; or

c. Guilty of manslaughter; or

d. Not guilty by reason of insanity; or

e. Not guilty.

The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime of murder in the first degree under this alternate allegation of Count I are:

1. That the defendant killed Janet Messner.

2. That he did so in an attempt to perpetrate a sexual assault in the first degree against her by intentionally engaging in conduct which, under the circumstances as he believed them to be, constituted a substantial step in a course of conduct intended by defendant to culminate in the crime of overcoming Janet L. Messner by force and subjecting her to sexual penetration.

3. That he did so on or about March 29, 1980.

4. That he did so in Lancaster County, State of Nebraska.

5. That at the time of the killing, the defendant, Randolph K. Reeves, was not insane.

The State has the burden of proving beyond a reasonable doubt each and everyone of the foregoing material elements of the crime of murder in the first degree necessary for conviction.

The sanity of the defendant must be proven by the State beyond a reasonable doubt. Instruction No. ___ following, separately discusses this material element.

If you find from the evidence beyond a reasonable doubt that each of the foregoing material elements is true,

it is your duty to find the defendant guilty of the crime of murder in the first degree. On the other hand, if you find that the State has failed to prove beyond a reasonable doubt one or more of the foregoing material elements, it is your duty to find the defendant not guilty of the crime of murder in the first degree. You shall then proceed to consider the lesser included offense of murder in the second degree.

The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime of murder in the second degree are:

1. That the defendant, Randolph K. Reeves, caused the death of Janet L. Messner.

2. That he did so intentionally, but without premeditation.

3. That he did so on or about March 29, 1980.

4. That he did so in Lancaster County, State of Nebraska.

5. That at the time of the killing, the defendant, Randolph K. Reeves, was not insane.

The State has the burden of proving beyond a reasonable doubt each and everyone of the foregoing material elements of the crime of murder in the second degree necessary for conviction.

If you find from the evidence beyond a reasonable doubt that each of the foregoing material elements is true, it is your duty to find the defendant guilty of the crime of murder in the second degree, and you shall not then

consider the lesser included offense hereafter set forth in this instruction. On the other hand, if you find that the State has failed to prove beyond a reasonable doubt any one or more of the foregoing material elements, it is your duty to find the defendant not guilty of the crime of murder in the second degree. You shall then proceed to consider the lesser included offense of manslaughter.

The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime of manslaughter are:

1. That the defendant, Randolph K. Reeves, killed Janet Messner

2. That he did so without malice, either upon a sudden quarrel or unintentionally, while Randolph K. Reeves was in the commission of some unlawful act.

3. That he did so on or about March 30, 1980.

4. That he did so in Lancaster County, State of Nebraska.

5. That at the time of the killing, the defendant, Randolph K. Reeves, was not insane.

The State has the burden of proving beyond a reasonable doubt each and everyone of the foregoing elements of the crime of manslaughter.

If you find from the evidence beyond a reasonable doubt that each of the foregoing material elements is true, it is your duty to find the defendant guilty of the crime of manslaughter. On the other hand, if you find the State has failed to prove beyond a reasonable doubt any one or more of the foregoing material elements, it is your duty

to find the defendant not guilty of the crime charged in Count I of the information.

RANDOLPH K. REEVES, Defendant

BY: /s/ Richard L. Goos
One of his attorneys

N.J.I. 14.06, See comment.

IN THE DISTRICT COURT
OF LANCASTER COUNTY, NEBRASKA

STATE OF NEBRASKA, Plaintiff, vs. RANDOLPH K. REEVES, Defendant.	))))))	Docket 56 Page 139 DEFENDANT'S REQUESTED INSTRUCTION NO. 2 (Filed March 26, 1981)

On Count II of the information in this case, depending on the evidence, you may find the defendant:

a. Guilty of murder in the first degree; or

b. Guilty of murder in the second degree; or

c. Guilty of manslaughter; or

d. Not guilty by reason of insanity; or

e. Not guilty.

* * *

IN THE DISTRICT COURT
OF LANCASTER COUNTY, NEBRASKA

STATE OF NEBRASKA, Plaintiff vs. RANDOLPH K. REEVES, Defendant	))))))	Docket 56 Page 139 DEFENDANT'S REQUESTED INSTRUCTION NO. 3 (Filed March 30, 1981)

Ordinarily, voluntary intoxication is no justification or excuse for crime; but excessive intoxication by which a person is wholly deprived of reason may prevent having the intent charged.

If you find that the defendant was intoxicated, that fact should be considered by you, together with all the facts and circumstances in evidence, for the purpose of determining whether or not you have a reasonable doubt that defendant was at the time in question capable of having the intent charged.

RANDOLPH K. REEVES, Defendant

BY: /s/ Richard L. Goos
One of his attorneys

N.J.I. 14.31

IN THE DISTRICT COURT
OF LANCASTER COUNTY, NEBRASKA

STATE OF NEBRASKA, Plaintiff vs. RANDOLPH K. REEVES, Defendant	)	Docket 56 Page 139 DEFENDANT'S REQUESTED INSTRUCTION NO. 4 (Filed March 30, 1981)

You are instructed that under the law of this State, if the defendant is found guilty by reason of insanity or mental derangement, the Court shall forthwith (1) commit defendant to the care and custody of the Director of Medical Services for a period not to exceed 30 days, and (2) certify the verdict to the Mental Health Board of the County and order that Board to determine whether the person so acquitted is a mentally ill dangerous person and a fit subject for custody and treatment in a hospital.

RANDOLPH K. REEVES, Defendant

BY: /s/ Richard L. Goos
One of his attorneys

§29-2203, R.R.S. 1943

IN THE DISTRICT COURT
OF LANCASTER COUNTY, NEBRASKA

STATE OF NEBRASKA, Plaintiff vs. RANDOLPH K. REEVES, Defendant	)	Docket 56 Page 139 DEFENDANT'S REQUESTED INSTRUCTION NO. 5 (Filed March 30, 1981)

You must also consider defendant's claimed mental diminished capicity [sic] and take all the evidence into consideration in determining whether defendant had the mental capacity to form any of the specific mental states that are essential elements of murder in the first degree and sexual assault in the first degree.

In this respect you must consider all the evidence, or lack of evidence, to determine whether the defendant had such reduced mental capacity (whether caused by mental illness, mental defect, intoxication, mental retardation, or a combination thereof,) that he could not form such mental state.

If you have a reasonable doubt as to whether defendant was capable of forming such mental state, you must find the absence of such essential element.

RANDOLPH K. REEVES, Defendant

BY: /s/ Richard L. Goos
One of his attorneys

REFERENCES:

Washington v. State, 165 Neb. 275, 85 N.W.2d 509
State v. Brown, 118 N.W.2d 332

Starkweather v. State, 167 Neb. 477, 93 N.W.2d 619
See, Judge Hugh Stuart's instruction #16-1/2, Simants murder case

Refused 3/31/81

IN THE DISTRICT COURT
OF LANCASTER COUNTY, NEBRASKA

STATE OF NEBRASKA, Plaintiff, vs. RANDOLPH K. REEVES, Defendant.	)	Docket 56 Page 139 MOTION FOR NEW TRIAL

COMES NOW the defendant in the above case and respectfully moves the Court for an Order granting him a new trial herein for any one or more of the following reasons:

* * *

9. Failure to give instructions on lesser-included offenses deprived defendant of a fair trial and due process of law in that such failure enhanced the risk of an unwarranted conviction of a greater offense, contrary to *Beck v. Alabama*, ___ U.S. ___ (1980).

10. Defendant was denied equal protection of the laws by failure to include lesser-included offenses in the instructions to the jury, in that in all other criminal cases in this state, a criminal defendant is entitled to a lesser-included offense when there is evidence which produces a rational basis for a verdict acquitting a defendant of the offense charged and convicting him of the lesser offense. *State v. Tamburano*, 201 Neb. 703, 271 NW.2d 472 (1978), and also whenever some of the elements of the crime charged in the information without the addition of any elements irrelevant to the original charge, may constitute another crime of crimes, such other crime or crimes are

included with the crime charge. *State v. Johnsen*, 197 Neb. 216.

* * *

RANDOLPH K. REEVES, Defendant

BY: /s/ Richard L. Goos
DENNIS R. KEEFE and
RICHARD L. GOOS,
His Attorneys

IN THE DISTRICT COURT
OF LANCASTER COUNTY, NEBRASKA

STATE OF NEBRASKA, Plaintiff vs. RANDOLPH K. REEVES, Defendant	)	Docket 56 Page 139 OBJECTIONS TO IMPOSITION OF DEATH PENALTY (Filed May 27, 1981)

COMES NOW the defendant and respectfully shows to the court that there lawfully cannot nor should there be a death penalty imposed in this case, for any one or more of the following reasons:

* * *

9. The death penalty may not be imposed in this case because to do so would violate the defendant's right to have due process of law, inasmuch as the lesser-included offense of second degree murder, not to mention the lesser-included offense of manslaughter, was not given to the jury for their consideration, as required by Nebraska law as enunciated in *State v. Tamburano*, 201 Neb. 703 (1978), and *State v. Johnsen*, 197 Neb. 216. Under such circumstances the death penalty may not be imposed. *See, Beck v. Alabama*, ___ U.S. ___, 100 S.Ct. 2382, 65 L.Ed.2d 392, (1980).

* * *

RANDOLPH K. REEVES, Defendant

BY: /s/ Richard L. Goos
FOR: Dennis R. Keefe and
Richard L. Goos,
His Attorneys

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

Relevant portions of the opinion of the United States District Court for the District of Nebraska are located at pages 17-20 of the Appendix to the Petition for Writ of Certiorari.

Randolph K. REEVES,
Appellee/Appellant

v.

Frank X. HOPKINS, Warden of the Nebraska Penal and Correctional Complex, Appellant/Appellee.

Nos. 95-1098, 95-1188.

United States Court of Appeals,
Eighth Circuit.

Submitted Sept. 9, 1996.

Decided Dec. 24, 1996.

Rehearing and Suggestion for Rehearing
En Banc Denied Feb. 27, 1997.*

Following affirmance, 239 Neb. 419, 476 N.W.2d 829, of petitioner's convictions of murder and sentence of death, petitioner sought habeas corpus relief. The United States District Court for the District of Nebraska, Richard G. Kopf, J., 871 F.Supp. 1182, granted petition. State appealed. The Court of Appeals, 76 F.3d 1424, reversed. On remand, the District Court, 928 F.Supp. 941, granted petition. State appealed. The Court of Appeals, Beam, Circuit Judge, held that: (1) petitioner did not have due process right to notice and opportunity to be heard before affirmance of his sentence on postconviction appeal, but (2) petitioner had due process right to have jury instructed on second degree murder and manslaughter.

Affirmed in part and reversed in part.

---

* Judge Fagg, Judge Wollman, and Judge Loken would grant the suggestion.

Bright, Circuit Judge, concurred separately and filed opinion.

J. Kirk Brown, Asst. Atty. Gen., Lincoln, NE, argued, for appellant.

Paula Hutchinson, Lincoln, NE, argued (Kent Gipson, Kansas City, MO, on the brief), for appellee.

Before BOWMAN, BRIGHT, and BEAM, Circuit Judges

BEAM, Circuit Judge.

Randolph Reeves was convicted of two counts of felony murder and sentenced to death. Following unsuccessful appeal and postconviction actions in Nebraska state court, Reeves was granted habeas corpus relief in federal district court. We reversed, but retained jurisdiction and remanded to the district court for findings on Reeves's remaining claims. The district court again granted the petition and vacated Reeves's death sentence. For the second time, the State appeals the district court's grant of the writ.

We conclude that the district court erred in its grounds for granting the writ. We also conclude, however, that the district court erred in deciding that Reeves was not entitled to a jury instruction on lesser included offenses, a violation of *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). On this basis, we conditionally grant Reeves's petition for habeas corpus.

I. BACKGROUND

The facts of this case are set out fully in the Nebraska Supreme Court's opinion in Reeves's state appeal. *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433, 438-40 (1984) ("*Reeves I*"). A summary, however, is in order.

On March 29, 1980, Reeves killed Janet Mesner and Victoria Lamm in a Quaker meetinghouse in Lincoln, Nebraska. Ms. Mesner and Reeves were friends, and were in fact related. Reeves, who had been drinking heavily and had ingested some peyote buttons, entered a window of the house and either sexually assaulted or attempted to sexually assault Ms. Mesner in her bedroom. In the course of the assault, Reeves stabbed Ms. Mesner seven times with a knife he had taken from the kitchen. When Ms. Lamm entered the room during the assault, Reeves stabbed her to death. Ms. Mesner was mortally wounded, but was able to find a telephone and dial 911. Ms. Mesner identified Reeves as her attacker before dying less than three hours later at a local hospital.

Reeves was charged with two counts of murder in the course of or while attempting a sexual assault in the first degree. *See* Neb.Rev.Stat. § 28-303. Reeves presented defenses of insanity and diminished capacity, but was convicted on both counts. Under Nebraska law, a first degree felony murder conviction carries possible sentences of life imprisonment or death. Neb.Rev.Stat. § 28-105(1). A three-judge sentencing panel sentenced Reeves to death. On appeal, the Nebraska Supreme Court held that the sentencing panel had failed to consider a mitigating factor and had improperly applied an aggravating factor in determining Reeves's sentence. *Reeves I*, 344 N.W.2d at

447-48. The court, however, reexamined the applicable factors and affirmed the death sentence. *Id.* at 448.

Reeves then pursued state postconviction remedies. The Nebraska Supreme Court again affirmed his sentence. *State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359, 388 (1990) ("*Reeves II*"). The United States Supreme Court, however, vacated *Reeves II* and remanded the case for reconsideration in light of its holdings in *Clemons v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990). *Reeves v. Nebraska*, 498 U.S. 964, 111 S.Ct. 425, 112 L.Ed.2d 409 (1990). On remand, the Nebraska Supreme Court once again affirmed Reeves's sentence. *State v. Reeves*, 239 Neb. 419, 476 N.W.2d 829, 841 (1991) ("*Reeves III*").

Reeves then brought this federal habeas corpus action under 28 U.S.C. § 2254, raising forty-four claims. The district court granted relief on the ground that the Nebraska Supreme Court did not have authority under state law to independently reweigh aggravating and mitigating factors in affirming a death sentence. *Reeves v. Hopkins*, 871 F.Supp. 1182, 1202 (D.Neb.1994). The district court considered and rejected Reeves's claims related to jury instructions, including a claim that the trial court improperly denied his request to have the jury instructed on lesser included offenses of felony murder, in violation of *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). *Reeves v. Hopkins*, 871 F.Supp. at 1205.[1] The court left unresolved seven of Reeves's claims.[2]

---

[1] The court also rejected Reeves's claim 44, challenging the introduction at trial of Janet Mesner's statements identifying Reeves as her attacker. *Reeves v. Hopkins*, 871 F.Supp. at 1210. Reeves has not cross-appealed this determination.

[2] The court did not reach claims 5, 6, 26, 27, 34, 36, and 38.

On appeal we reversed, holding that the district court exceeded federal court authority in determining that Nebraska law did not authorize the Nebraska Supreme Court to reweigh aggravating and mitigating factors in capital cases. *Reeves v. Hopkins*, 76 F.3d 1424, 1427 (8th Cir.), *cert. denied*, ___ U.S. ___, 117 S.Ct. 307, 136 L.Ed.2d 224 (1996). We did not reach Reeves's *Beck* claim, instead remanding and instructing the district court to make determinations on the claims it had not reached. *Id.* at 1430-31. We expressly noted that we retained jurisdiction on those issues decided by the district court that we had not reached, and would consolidate those issues with any future appeal. *Id.* at 1431.

On remand, the district court rejected all but one of Reeves's remaining claims. The court determined that the Nebraska Supreme Court had resentenced Reeves in *Reeves III* when it again affirmed the death penalty on remand from the United States Supreme Court, but violated due process by failing to give Reeves notice of resentencing and an opportunity to be heard. *Reeves v. Hopkins*, 928 F.Supp. 941, 965-66 (D.Neb.1996).[3]

The State appeals the district court's findings on the due process claim, and we agree that the court below erred on this issue. We also conclude, however, that Reeves's *Beck* claim is meritorious and that the district

---

[3] The district court also concluded that our retention of jurisdiction in our prior decision rendered it without authority to consider Reeves's motion to submit new evidence of actual innocence. *Reeves v. Hopkins*, 928 F.Supp. at 976. Reeves appeals this conclusion. Because we grant the writ on other grounds, we need not reach this issue.

court improperly rejected this claim in its first decision in 1994.

II. DISCUSSION

In this section 2254 habeas corpus action, we review the district court's factual findings for clear error and its legal conclusions de novo. *Culkin v. Purkett*, 45 F.3d 1229, 1232 (8th Cir.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 127, 133 L.Ed.2d 76 (1995).

A. The Due Process Claim

The district court granted relief on claim 34 of Reeves's petition, in which Reeves claims that:

> The death penalty was unconstitutionally applied to Petitioner in that the Nebraska Supreme Court in resentencing Petitioner on remand denied Petitioner notice and an opportunity to be heard in violation of the Sixth and Eighth Amendments and the [Due Process] and Equal Protection Clauses of the Fourteenth Amendment.

Petitioner's First Amended Petition for Writ of Habeas Corpus, at 37-38.

Reeves's claim involves his state postconviction proceedings. After his convictions and sentences were affirmed on direct appeal in *Reeves I*, Reeves sought state postconviction remedies. In *Reeves II*, the Nebraska Supreme Court affirmed denial of postconviction relief. 453 N.W.2d at 388. On petition for writ of certiorari, the United States Supreme Court vacated *Reeves II* and remanded for "further consideration in light of *Clemons v. Mississippi*." *Reeves v. Nebraska*, 498 U.S. 964, 111 S.Ct. 425, 112 L.Ed.2d 409 (1990). In *Clemons*, the Supreme Court had recently held that a death sentence based in part on an invalidly applied aggravating factor (which the Nebraska court found had occurred in Reeves's case) could be affirmed by an appellate court. If state law allows, an appellate court in such a case may either: (1) conduct a harmless error analysis; or (2) independently reweigh the applicable aggravating and mitigating circumstances. 494 U.S. at 750, 752, 110 S.Ct. at 1449, 1450.

Reeves claims that when the Nebraska court once again affirmed his sentence in *Reeves III*, this amounted to a reimposition of the death sentence. This "resentencing," Reeves argues, was done without Reeves being aware that he would be subject to such resentencing by the state court. He was thus unable to argue against imposition of the death penalty and was caught by surprise when the court affirmed the sentence, rather than remanding to a new sentencing panel. Reeves claims that this violated his rights under the Fourteenth Amendment to notice and an opportunity to be heard.

On remand, the Nebraska Supreme Court issued an order directing Reeves and the State to submit simultaneous briefs "covering the subject of the remand." Petitioner's Brief at 2. According to Reeves, his counsel was uncertain of the meaning of the phrase "the subject of the remand." Reeves's attorney filed a series of motions with the Nebraska court attempting to clarify the scope of the

issues before the court, most of which the court denied,[4] and unsuccessfully sought to clarify the scope of the remand at oral argument. The district court agreed with Reeves that he "was not provided with adequate notice that he would be sentenced to death." 928 F.Supp. at 961. The court reasoned that "[h]owever the 20-minute oral argument in *Reeves III* might otherwise be characterized, we know in retrospect that it was ultimately the one proceeding where it would be determined whether [Reeves's convictions] warranted the death penalty." *Id.* at 964.

We part ways with the district court on a fundamental premise: *Reeves III* simply was not the "one proceeding" where the state determined that Reeves's crimes "warranted the death penalty." *Reeves II* was Reeves's appeal of his unsuccessful *postconviction* attack on his convictions and sentence. After the sentencing panel originally imposed the death sentence, the Nebraska Supreme Court affirmed the sentence on direct appeal in *Reeves I*.[5]

---

[4] The court granted Reeves's motion to extend oral argument to 20 minutes. The court denied, without comment, motions: (1) requesting notice if the court "intended to engage in resentencing on appeal"; (2) for an evidentiary hearing to present evidence relevant to resentencing; and (3) to set forth an order of procedure.

[5] Reeves argues that in *Reeves I*, the Nebraska court, after finding that an aggravating factor had been improperly applied by the sentencing panel, affirmed on the basis that some aggravating factors remained, rather than independently reweighing the mix of aggravating and mitigating factors as required by *Clemons*. We reject this contention. The court in *Reeves I* expressly noted "our analysis is not confined to a mere counting process of aggravating and mitigating circumstances

The United States Supreme Court's remand of *Reeves II* for reconsideration in light of *Clemons* did nothing to unsettle the prior conclusion in *Reeves I*.[6]

It is true that in *Reeves III* the Nebraska Supreme Court reviewed in some detail its thinking on the propriety of Reeves's sentence. The court reexamined the applicable aggravating and mitigating factors, and concluded that "[w]e have balanced the aggravating and mitigating factors anew and have determined that the aggravating circumstances outweigh any statutory or nonstatutory mitigating circumstances in this case. . . . Sentences of death remain the appropriate penalties for Reeves." *Reeves III*, 476 N.W.2d at 841. However, the court's review was not a "resentencing" because Reeves's sentence had never been voided. We agree with the State that the court's discussion was merely a recasting of its prior conclusions in light of the guidance offered by *Clemons*.

---

but, rather, to a reasoned judgment as to what factual situations require the imposition of death and which of those can be satisfied by life imprisonment in light of the totality of the circumstances present." *Reeves I*, 344 N.W.2d at 448.

[6] Reeves's reliance on *Lankford v. Idaho*, 500 U.S. 110, 111 S.Ct. 1723, 114 L.Ed.2d 173 (1991), is misplaced. In *Lankford*, the original decision of the trial court imposing the death sentence violated due process because the defendant (and even the prosecution) did not know that the trial court was contemplating the death penalty, and neither side addressed it during the sentencing hearing. *Id.* at 114-17, 111 S.Ct. at 1726-28. Reeves, however, has been under a final sentence of death since 1984, when *Reeves I* affirmed his sentence. He cannot say that the affirmance of his sentence – for the third time – in *Reeves III* was a surprise.

We also reject Reeves's argument that the Nebraska Supreme Court's conclusion in *Reeves III* that it was authorized to reweigh aggravating and mitigating factors was a new rule that it announced simultaneous with its application to him. First, it should have been clear to Reeves since *Reeves I* that the state court believed it had authority to reweigh, since that is exactly what it did on direct appeal in that case. Second, the Nebraska Supreme Court had previously stated that it could "weigh[ ] anew the aggravating and mitigating circumstances . . . as permitted by *Clemons v. Mississippi*." *State v. Otey*, 236 Neb. 915, 464 N.W.2d 352, 361 (1991). We reject Reeves's argument that the language in *Otey* is "summary" and does not articulate the court's power to reweigh under *Clemons*. In any event, since Reeves was not "resentenced" in *Reeves III*, his "new rule" argument is largely irrelevant.[7]

---

[7] Reeves also argues that the decision in *Reeves III* should be treated as a resentencing because the State had, in prior filings in this habeas action, referred to it as such. It is true that a party cannot argue on appeal a legal theory directly contrary to the one advanced in district court. *Bissett v. Burlington Northern R.R.*, 969 F.2d 727, 732 (8th Cir.1992). We do not believe, however, that the State's mere use of the word "resentence" in discussing other issues in these proceedings constitutes advancement of a legal theory or position. Finally, Reeves asserts that in *State v. Moore*, 243 Neb. 679, 502 N.W.2d 227, 229 (1993), the Nebraska Supreme Court itself referred to the "resentencing" it had done in Reeves's appeal. ("As indicated in *State v. Reeves* . . . , we have the authority to resentence by analyzing and reweighing the aggravating and mitigating factors of the case."). Again, we do not believe that semantic niceties change the nature of the remand in *Reeves III*. In any event, the court in *Moore* was referring to its decision in *Reeves I*, not *Reeves III*.

In sum, the Nebraska Supreme Court did not "resentence" Reeves in *Reeves III*. Reeves's sentence of death was made final when the court affirmed his convictions and sentence on direct appeal in *Reeves I*, and the remand of the court's determination in Reeves's postconviction proceedings did nothing to void that sentence. For these reasons, we reject Reeves's due process claim.

B. The *Beck* Claim

Reeves was charged with two counts of first degree murder under a felony murder theory, for killing during the course of a first degree sexual assault or attempted first degree sexual assault.[8] Under Nebraska law, first degree murder is punishable by either life imprisonment or by death. Neb.Rev.Stat. §§ 28-303, 28-105(1). Reeves requested, and was denied, jury instructions on second degree murder and manslaughter.[9] The jury was therefore

---

[8] Reeves was charged under Neb.Rev.Stat. § 28-303, which provides that:

> A person commits murder in the first degree if he kills another person (1) purposely and with deliberate and premeditated malice, or (2) in the perpetration of or attempt to perpetrate any sexual assault in the first degree, arson, robbery, kidnapping, hijacking of any public or private means of transportation, or burglary
>
> . . . .

[9] The applicable statutory provisions are as follows:

> **§ 28-304. Murder in the second degree; penalty.**
>
> (1) A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation.

only instructed on the crime of first degree felony murder. Reeves argues that the refusal of his proposed instructions violated *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). We agree.

In *Beck*, the petitioner was tried on a single count of intentionally killing during the course of a robbery. *Id.* at 627, 100 S.Ct. at 2384. Under Alabama law, when a jury found a defendant guilty of this charge, it was required by statute to return a sentence of death. *Id.* at 628 n. 3, 100 S.Ct. at 2385 n. 3. The trial court, however, was the final sentencer and was free to impose the death sentence or a life term. *Id.* at 629 n. 4, 100 S.Ct. at 2385 n. 4. The statute under which Beck was charged expressly prohibited trial courts from giving instructions on lesser included noncapital offenses, even if the evidence would support a conviction on a lesser included offense. *Id.* at 628 & n. 3, 100 S.Ct. at 2385 & n. 3.

The Supreme Court held that in a capital case due process requires that the jury be given the option of convicting the defendant on a lesser included noncapital offense if the evidence would support conviction on that offense. *Id.* at 638, 100 S.Ct. at 2390. The Court in *Beck*

---

§ 28-305. Manslaughter; penalty.

(1) A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an ~~unlawful act~~.

Second degree murder carries a maximum sentence of life imprisonment. *Id.* at §§ 28-304(2), 28-105(1). Manslaughter carries a maximum sentence of twenty years. *Id.* at §§ 28-305(2), 28-105(1).

sought to avoid presenting juries with a "death or nothing" choice between conviction of a capital crime and finding the defendant not guilty. Faced with such a choice, jurors might decide to acquit, even though they believed that the defendant had committed a crime. On the other hand, they might convict of the capital crime, even though they felt that the defendant did not deserve the death penalty. This choice, the Court explained, is unacceptable because "the unavailability of the third option of convicting on a lesser included offense may encourage the jury to convict for an impermissible reason – its belief that the defendant is guilty of some serious crime and should be punished." *Id.* at 642, 100 S.Ct. at 2392. This risk of such a choice "cannot be tolerated in a case in which the defendant's life is at stake." *Id. See also Schad v. Arizona*, 501 U.S. 624, 646, 111 S.Ct. 2491, 2504-05, 115 L.Ed.2d 555 (1991). As the Court later explained, "[t]he goal of the *Beck* rule . . . is to eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence." *Spaziano v. Florida*, 468 U.S. 447, 455, 104 S.Ct. 3154, 3159-60, 82 L.Ed.2d 340 (1984).

The State argues that *Beck* is inapplicable because the Nebraska Supreme Court has determined that, under state law, there are no lesser included offenses of felony murder. Both before and after Reeves's conviction, the Nebraska court repeatedly made clear its view that in felony murder cases "it is error for the trial court to instruct the jury that they may find defendant guilty of murder in the first degree, guilty of murder in the second degree, or guilty of manslaughter." *State v. Montgomery*, 191 Neb. 470, 215 N.W.2d 881, 883 (1974). *See also State v.*

Massey, 218 Neb. 492, 357 N.W.2d 181, 185-86 (1984) (quoting *Reeves I*, 344 N.W.2d at 442); *State v. Hubbard*, 211 Neb. 531, 319 N.W.2d 116, 118 (1982); *State v. McDonald*, 195 Neb. 625, 240 N.W.2d 8, 14 (1976). We are directly faced, therefore, with the question whether the State's prohibition is consistent with *Beck*.

The State contends that once the Nebraska Supreme Court has determined that felony murder has no lesser included offenses, then Reeves's *Beck* claim necessarily fails. The State urges us to follow *Greenawalt v. Ricketts*, 943 F.2d 1020 (9th Cir.1991), in which the Ninth Circuit rejected an Arizona prisoner's *Beck* claim. The court in that case reasoned that "Greenawalt was tried solely for felony murder, a crime for which Arizona law recognizes no lesser included offense." *Id.* at 1029 (citing *State v. Greenawalt*, 128 Ariz. 150, 624 P.2d 828, 846 (1981)) (*en banc*). The court concluded on this basis that *Beck* was inapplicable.

We cannot agree with this interpretation of the *Beck* doctrine. The State's position would say in effect that *Beck* means only that a criminal defendant is entitled to instructions on lesser included offenses to which state law says he or she is entitled. But if this were true, then *Beck* itself would have been decided differently. In *Beck*, as in this case, state substantive law specifically prohibited the giving of a lesser included offense instruction. The problem was not merely a trial court's decision not to instruct the jury, nor was it Alabama's definition of lesser included offenses. The unacceptable constitutional dilemma was that state law *prohibited* instructions on noncapital murder charges in cases where conviction made the defendant death-eligible. The prohibition in

Reeves's case is based on the Nebraska Supreme Court's pronouncement of state law, rather than upon a statute. But there is no principled reason to distinguish such a prohibition imposed by the state courts from one imposed by the state legislature.[10] The constitutional violation is the same.

---

[10] Similarly, the Fifth Circuit has held that the *Beck* doctrine imposes federal constitutional limits on state law governing when a trial court may refuse to give an instruction on a lesser included offense. *Cordova v. Lynaugh*, 838 F.2d 764, 767 (5th Cir.1988). The court noted that "[i]f due process is violated because a jury cannot consider a lesser included offense that the 'evidence would have supported,' . . . the source of that refusal, whether by operation of state law or refusal by the state trial court judge, is immaterial." *Id.* at 767 n. 2 (citation to *Beck* omitted).

We note that in rejecting a petitioner's *Beck* argument in *Blair v. Armontrout*, we stated that "*Beck* does not prescribe a first-degree murder instruction in this case unless first-degree murder is a lesser-included offense of capital murder . . . and the [State] Supreme Court [has held] that first-degree murder [is] not a lesser-included offense of capital murder." 916 F.2d 1310, 1326 (8th Cir.1990). In *Blair*, however, we did not directly face the issue whether *Beck* could be vitiated by a state's determination that a particular crime has no lesser included offenses. There was no *Beck* violation in *Blair* because: (1) the jury had both the option and power to impose a life sentence, rather than a death sentence; and (2) the defendant *was* given jury instructions on both second degree murder and manslaughter. *Id.* Neither is true of this case.

We made a similar statement regarding a state's definitions of lesser included offenses in *Williams v. Armontrout*, 912 F.2d 924, 928 (8th Cir.1990) (*en banc*). In that case, however, *Beck* did not apply because the evidence would not have supported a conviction for the charge for which the defendant requested an instruction. *Id.* at 929. *Williams* was thus squarely within the

We believe that in arguing to the contrary, the State misreads the Supreme Court's clarifications of the *Beck* doctrine. In *Hopper v. Evans*, the Court held that under *Beck* "due process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction." 456 U.S. 605, 611, 102 S.Ct. 2049, 2053, 72 L.Ed.2d 367 (1982) (emphasis in the original). In *Spaziano*, the Court held that *Beck* did not apply when the statute of limitations had run on all lesser included offenses and the defendant refused to waive the statute. 468 U.S. at 456-57, 104 S.Ct. at 3160-61. The Court stated that "[w]here no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the process. *Beck* does not require that result." *Id.* at 455, 104 S.Ct. at 3159.

The Ninth Circuit in *Greenawalt* cited *Spaziano* to support its conclusion that Arizona's nonrecognition of any lesser included offenses foreclosed a *Beck* claim. *Greenawalt*, 943 F.2d at 1029. We believe that this reads *Spaziano* much too broadly. In *Spaziano*, the defendant *could not have been convicted* of any lesser included offenses because the applicable statutes of limitation had all run and the defendant refused to waive them. The Court found that instructing the jury on a charge that could not have resulted in a conviction would compound the distortion of factfinding that troubled it in *Beck*:

---

limitation on *Beck* clarified by *Hopper v. Evans*, 456 U.S. 605, 611, 102 S.Ct. 2049, 2052-53, 72 L.Ed.2d 367 (1982) (holding that *Beck* requires instructions on noncapital offenses only when the evidence would support a conviction on that charge).

> Requiring that the jury be instructed on lesser included offenses for which the defendant may not be convicted . . . would simply introduce another type of distortion into the factfinding process.
>
> . . . *Beck* does not require that the jury be tricked into believing that it has a choice of crimes for which to find the defendant guilty, if in reality there is no choice.

Id. at 455-56, 104 S.Ct. at 3160. *Spaziano* does not stand, therefore, for the proposition that state law can foreclose *Beck* claims by declaring that felony murder has no lesser included offenses; this is exactly what the Alabama legislature had done in *Beck*, after all.[11] *Spaziano* stands, rather, for the eminently sound notion that juries should not be mislead into "convicting" someone of a charge for which he or she cannot be convicted. There is no question of such trickery in this case. Reeves could have been convicted and sentenced for either second degree murder or manslaughter.

The State's rationale for prohibiting instructions for noncapital murder in felony murder cases further supports our conclusion. The Nebraska Supreme Court has said that felony murder differs from other murder

---

[11] The State argues that "but for the specific statute struck down which prohibited such jury instructions [on lesser included offenses], there existed, under Alabama law, lesser included offenses of the crime with which Beck was charged." State's Reply Brief (1995) at 11-12. But this is merely to say that "if state law had not prohibited an instruction, it would have permitted it." This is, of course, true. But it is equally true of Nebraska law.

because it requires no showing of any intent to kill: "The turpitude involved in the [underlying felony] takes the place of intent to kill or premeditated malice, and the purpose to kill is conclusively presumed from the criminal intention required for [the underlying felony]." *Reeves I*, 344 N.W.2d at 442 (citations omitted). Thus, a finding that Reeves intended the underlying felony (actual or attempted first degree sexual assault) takes the place of any showing that Reeves intended to kill. At oral argument, the State reiterated that the difference between the mental states required for felony murder and premeditated first degree murder is the basis for the prohibition on lesser included offense instructions in felony murder cases.

There is nothing necessarily unconstitutional with the State's definition of the mental culpability required for a felony murder conviction. However, the *death penalty* cannot be imposed on a defendant without a showing of some culpability *with respect to the killing itself*. *Enmund v. Florida*, 458 U.S. 782, 801, 102 S.Ct. 3368, 3378-79, 73 L.Ed.2d 1140 (1982). Before a state can impose the death penalty, there must be a showing of both major participation in the killing and reckless indifference to human life. *Tison v. Arizona*, 481 U.S. 137, 158, 107 S.Ct. 1676, 1688, 95 L.Ed.2d 127 (1987). *Enmund* and *Tison* are thus independent constitutional requirements of the mental culpability a state must prove if it is to impose a *death sentence;* if the death sentence is to be imposed, the state must necessarily produce some evidence of intent with respect to the *killing*. Nebraska's rationale for prohibiting lesser included offense instructions in felony murder cases thus disappears when the defendant is sentenced to death. We

are led to the conclusion that the State may not, consistent with the Constitution, bar an instruction on noncapital homicide, in a felony murder case where the death sentence is imposed, on the basis that felony murder requires no showing of intent or, at least, a reckless indifference to the value of human life. To hold otherwise would mean that the State could avoid *Beck* by claiming that it need show no intent or reckless indifference with respect to the killing, yet could simultaneously avoid *Enmund* by adducing precisely such evidence.

We do not suggest that the State may not impose the death penalty pursuant to a felony murder conviction. We mean to say only that the State's prohibition on instructions on noncapital charges in felony murder cases is inconsistent with *Beck*, and that its rationale for the prohibition would put *Beck* at odds with *Enmund*. In *Greenawalt*, the Ninth Circuit reads *Enmund* to apply only in situations of "accomplice felony murder" where the Eighth Amendment requires a specific showing of mens rea before the death penalty may be imposed. 943 F.2d at 1028. We think this unduly narrows the Supreme Court's holdings in *Enmund* as well as *Tison*, especially in cases such as this. Reeves's insanity and diminished capacity defenses raise the same "mental state" concerns considered by the Court in both *Enmund* and *Tison;* indeed, the facts of this case and Reeves's defenses indicate the need for particular care that Reeves's "punishment . . . be tailored to his personal responsibility and moral guilt." *Enmund*, 458 U.S. at 801, 102 S.Ct. at 3378.

The death penalty concerns expressed in *Enmund* and *Tison* lie at the core of the *Beck* doctrine. As the Court explained in *Hopper*, *Beck* teaches that the Eighth and

Fourteenth Amendments require that the death penalty must be "channeled so that arbitrary and capricious results are avoided." 456 U.S. at 611, 102 S.Ct. at 2052. We believe that Reeves's case comes within *Beck* and *Hopper*. The facts would have supported a conviction for either second degree murder or manslaughter, and unlike in *Spaziano*, Reeves could have been convicted and sentenced for those crimes. Instead, Reeves's jury was faced with a stark choice: convict Reeves of capital murder or acquit him altogether.[12] State law, whether expressed by a statute or by a court, may not prohibit an instruction on a noncapital charge that the evidence supports when the defendant is subsequently sentenced to death.[13] We

[12] Furthermore, the "death or acquit" dilemma may have been exacerbated in Reeves's case. Reeves presented an insanity defense, but the trial court refused to instruct the jury that an acquittal by reason of insanity would not have resulted in Reeves's release. In addition, the prosecutor erroneously told the jury in summation that an acquittal would mean that Reeves would "walk out of this courtroom a free man." While the district court was unsure whether the prosecutor's statement referred to Reeves's insanity defense or merely to the effect of an acquittal on the merits, the Nebraska Supreme Court stated in *Reeves I* that "the statement made by the prosecutor was not an entirely correct statement of the law." 344 N.W.2d at 443. While we agree with the district court that neither the refused insanity instruction nor the prosecutor's misstatement is sufficient in itself to violate due process, *infra* at 986, the effect could only have heightened the "death or acquit" dilemma.

[13] The State argues that *Beck* involved a statute that automatically imposed the death sentence, whereas Reeves's jury had no involvement in sentencing. But the Alabama statute in *Beck* was not a "mandatory death" statute; the judge had final sentencing authority, and was free to reject the death penalty. Furthermore, Reeves correctly argues that when *Beck* was

therefore hold that the trial court's refusal to grant Reeves's request for instructions on second degree murder and manslaughter violated *Beck v. Alabama*.

C. Reeves's Other Claims

The only claims Reeves presents on cross-appeal are those numbered 20, 20(a), 20(c), 22, and 23. We agree with the district court's dismissal of each of those claims.[14]

Claims 20 and 20(a): Reeves claims that the trial court erred in its instructions on his insanity defense and on the culpability the State needed to prove to establish the predicate felony (first degree sexual assault) of the felony murder charge. The district court rejected Reeves's argument that the trial court's instructions established invalid

decided, the Supreme Court had already declared "mandatory death" statutes unconstitutional in *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991-92, 49 L.Ed.2d 944 (1976). This case is like *Beck:* the jury had no ultimate control over the imposition of a death sentence and could only choose to convict Reeves of a death-eligible crime or to acquit him.

[14] In its 1994 order granting habeas, the district court considered and rejected Reeves's claims numbered 20, 20(a), 20(c), 22, 23, and 44. On remand after we reversed, the district court considered the remaining claims (claims 5, 6, 26, 27, 34, 36, and 38) that it had not reached in its first ruling. Claim 34 is the due process claim that the district court granted relief on, which we discuss and reject in part II.A. In the prior appeal before this court, Reeves did not cross-appeal the dismissal of claim 44, nor does he now cross-appeal the district court's conclusions on claims 5, 6, 26, 27, 36, and 38. Reeves has therefore abandoned those claims and we need not consider the district court's dismissal of them.

conclusive presumptions of fact and relieved the prosecution of its burden of proof of elements of the crime charged, in violation of *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). We agree with the district court that the trial court properly instructed the jury, and did not so shift the burden of proof.

Claim 20(c): Reeves claims that the failure to give an instruction on noncapital homicide in his case violated equal protection, because defendants charged with premeditated first degree murder are entitled to such an instruction under Nebraska law. We agree with the district court that Reeves did not fairly present this argument in state court, and that under Nebraska law Reeves has abandoned this claim. *See State v. Evans*, 215 Neb. 433, 338 N.W.2d 788, 795 (1983). Reeves has thus defaulted review of this claim in federal habeas proceedings, *Morris v. Norris*, 83 F.3d 268, 270 (8th Cir.1996), and has made no showing of cause to excuse his default. *Wainwright v. Sykes*, 433 U.S. 72, 87, 97 S.Ct. 2497, 2506-07, 53 L.Ed.2d 594 (1977).

Claim 22: Reeves claims that the trial court erred by refusing his requested instruction on diminished capacity. We agree with the district court that the trial court's instructions on intoxication and insanity covered largely the same ground as the requested instruction, and that the refusal thus did not result in a miscarriage of justice. *Closs v. Leapley*, 18 F.3d 574, 579 (8th Cir.1994).

Claim 23: In rebuttal closing argument, the prosecutor told the jury that if "[t]he State doesn't prove this case beyond a reasonable doubt, then the State shouldn't win and this defendant should walk out of this courtroom a

free man." *Reeves v. Hopkins*, 871 F.Supp. at 1207. The trial court denied Reeves's motion for a mistrial based on this statement. Reeves asserts that this comment gave the jury the false impression that an acquittal on the basis of insanity would result in Reeves's release. This, Reeves argues, was so misleading as to unfairly prejudice his trial.

The district court noted that this reference was one sentence in the midst of a forty-eight minute argument, and occurred on a day where the jury heard more than four hours of argument from both the prosecution and defense. The court found that the context, ambiguity, and passing nature of the remark indicated little likelihood that it could have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Pickens v. Lockhart*, 4 F.3d 1446, 1453 (8th Cir.1993) (citations omitted). We agree that Reeves has not shown that this isolated remark constituted constitutional error.

D. Relief

Having found Reeves's *Beck* claim meritorious, we must still determine what relief is appropriate. We have previously held that *Beck* only applies in cases where the defendant is in fact sentenced to death. *Pitts v. Lockhart*, 911 F.2d 109, 112 (8th Cir.1990). The *Beck* violation in this case thus can be cured in one of two ways: (1) by granting Reeves a new trial; or (2) by resentencing Reeves to life imprisonment, which is a statutorily authorized sentence for felony murder.[15] We therefore find it appropriate to

---

[15] *See* Neb.Rev.Stat. §§ 28-303, 28-105(1).

grant a conditional writ of habeas corpus: Reeves's conviction will be vacated subject to a new trial unless, within 180 days from the issuance of the mandate, his death sentence is modified to life imprisonment.

III. CONCLUSION

We find that the trial court's refusal to instruct the jury on noncapital murder charges violated *Beck v. Alabama*, and that the district court thus erred in dismissing Reeves's claim 20(b). We conditionally grant Reeves's petition for the writ of habeas corpus: his conviction will be vacated subject to a new trial unless the State resentences Reeves to life imprisonment within 180 days. Because we conclude that Reeves's due process argument is groundless, we reverse the district court's finding on claim 34. We affirm the district court's findings dismissing all of Reeves's other claims.

BRIGHT, Circuit Judge, concurring separately.

Judge Beam's well written opinion persuasively and logically explains that the application of *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), requires that we remand this case for appropriate relief under a conditional writ of habeas corpus. I agree.

Having directed the issuance of a writ of habeas corpus, which will require the State of Nebraska either to retry Reeves or sentence him to life imprisonment, I would not reach the due process claim discussed in part II A of the court's opinion. In all other respects, I concur.

EIGHTH CIRCUIT ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 95-1098NEL
No. 95-1188NEL

Randolph K. Reeves, Appellee/Appellant, vs. Frank X. Hopkins, Appellant/Appellee.	*	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. Judge Fagg, Judge Wollman, and Judge Loken would grant the suggestion.

The petition for rehearing by the panel is also denied.

February 27, 1997

Order Entered, at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

---

(4)

No. 96-1693

In The

Supreme Court of the United States

October Term, 1997

FRANK X. HOPKINS, Warden,
Nebraska State Penitentiary,

Petitioner,

v.

RANDOLPH K. REEVES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITIONER'S BRIEF ON THE MERITS

DON STENBERG
Attorney General

J. KIRK BROWN
Counsel of Record
Assistant Attorney General
P.O. Box 98920
Lincoln, Nebraska 68509-8920
Tel: (402) 471-2682

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

52pp

QUESTIONS PRESENTED FOR REVIEW

These questions arise in the context of Nebraska statutes, under which death is a potential penalty for the crime of first degree murder, which may be committed under a felony murder theory, but in which the determination of whether the convicted individual is "death eligible" is reserved exclusively to the penalty phase of that proceeding.

1. The opinion of the Eighth Circuit Court of Appeals creates a direct and admitted conflict with the opinion of the Ninth Circuit Court of Appeals in *Greenawalt v. Ricketts*, 943 F.2d 1020, 1029 (9th Cir. 1991), *cert. denied*, 506 U.S. 888 (1992) which requires resolution.

2. May a federal court require a state court, in a first degree murder case being prosecuted under a traditional felony murder theory, to ignore state substantive law and instruct its guilt phase juries on lesser homicide offenses which have never been recognized as lesser included offenses of first degree felony murder, in order to satisfy this Court's ruling in *Beck v. Alabama*?

3. Is the rule announced by the circuit court a "new rule" under *Teague v. Lane*?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES CITED

Page

CASES

TABLE OF AUTHORITIES CITED – Continued

Page

TABLE OF AUTHORITIES CITED – Continued

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit in question here can be found at *Reeves v. Hopkins*, 102 F.3d 977 (8th Cir. 1996) and in the Joint Appendix (hereinafter "JA"), 41.

JURISDICTION

The opinion of the United States Court of Appeals for the Eighth Circuit was issued on December 24, 1996.

Your petitioner's (hereinafter "Warden") motion for rehearing and suggestion for rehearing en banc was denied on February 27, 1997.

CONSTITUTIONAL AND STATUTORY PROVISIONS

> Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Constitution of the United States, Eighth Amendment.

> Murder; person found guilty; sentence; determination. Whenever any person is found guilty of a violation of section 28-303, the district court shall within seven days fix a date for hearing on determination of the sentence to be imposed. Such determination shall be made by: (1) The judge who presided at the trial or who accepted the plea of guilty; (2) a panel of three judges including the judge who presided or accepted the plea, the two additional judges having been designated by the Chief Justice of

the Supreme Court after receiving a request therefor from the presiding judge; or (3) a panel of three district judges named by the Chief Justice of the Supreme Court when such Chief Justice has determined that the presiding judge is disabled or disqualified after receiving a suggestion of such disability or disqualification for the clerk of the court in which the finding of guilty was entered.

Neb. Rev. Stat. § 29-2520 (Reissue 1995).

After hearing all of the evidence and arguments in the sentencing proceeding, the judge or judges shall fix the sentence at either death or life imprisonment, but such determination shall be based upon the following considerations:

(1) Whether sufficient aggravating circumstances exist to justify imposition of sentence of death;

(2) Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

In each case in which the court imposes the death sentence, the determination of the court shall be in writing and shall be supported by written findings of fact based upon the records of the trial and the sentencing proceeding, and referring to the aggravating and mitigating circumstances involved in its determination.

If an order is entered sentencing the defendant to death, a date for execution shall not be fixed until after the conclusion of the appeal provided for by section 28-2525.

Neb. Rev. Stat. § 29-2522 (Reissue 1995).

STATEMENT OF THE CASE

The crime

The following is taken from the opinion of the Nebraska Supreme Court in the course of its mandatory direct appeal of Reeves' convictions and sentences found at *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984) (hereinafter *"Reeves I"*).

At 3:46 a.m. on March 29, 1980, Janet L. Mesner made a 911 emergency call and reported that she had been stabbed, that she thought a friend was dead from stab wounds, and that her address was 3319 South 46th Street, Lincoln, Nebraska. This address was a Religious Society of Friends meetinghouse, a place in which those of the Quaker religious faith meet. Since 1977, Janet Mesner had been a live-in caretaker of the premises. Victoria L. Lamm and her 2-year-old daughter were visitors.

Lincoln police officer Steven R. Imes responded to the call and, upon his arrival, found Janet Mesner lying on the floor in the rear of the house and attended by two or three firemen. She had seven stab wounds to her chest. When Officer Imes asked who had stabbed her, Janet replied, "Randy Reeves." The officer asked if there was anyone else still in the residence.

Janet replied, "My friend, I think she's dead, and a little girl."

Officer Imes then went upstairs and found the partially clad body of Victoria Lamm lying face up in the south bedroom. There was a fatal stab wound in her chest, which penetrated the main pulmonary artery of the heart, and a stab wound in her midline, which pierced the liver.

The disordered condition of the room in which Victoria's body was found indicated that a violent struggle had taken place. The floor was covered with blood, and several articles of women's bedclothes, a piece of luggage, and papers were strewn about the room. A lamp and sewing machine were overturned, and the telephone was ripped from its wall socket. A billfold containing identification of the defendant was found near Victoria Lamm's foot. In the middle of the blood-soaked sheets on the bed, underwear, later identified as belonging to the defendant, was found. Later examination of the underwear revealed the presence of spermatozoal secretions of the defendant's blood type. Next to the bed was one of the defendant's socks. A serrated kitchen knife with Janet Mesner's blood on it was found near the bed.

When Officer Imes was investigating the bedroom, Victoria's 2-year-old daughter walked from the north upstairs bedroom. She was unharmed.

On the main floor the police found an open window in a small room adjoining the kitchen. On the outside of the house below the open window was a garbage can turned upside down. Next to the garbage can were two shoe prints in the mud; inside the house was a shoeprint in the

downstairs den – all of which had the same characteristics as the shoes the defendant was wearing at the time of his arrest.

Janet Mesner was taken to Lincoln General Hospital in Lincoln where she was attended to by Drs. Chester Paul and Denise Capek. When Dr. Paul first saw Janet, she was in shock and emergency medical procedures were being undertaken.

Officer Richard J. Lutz, who had been dispatched to the emergency room, was present when Janet arrived. Janet told the officer that she had been "raped and stabbed" by Randy Reeves, and she gave his description. Janet did not know how Randy gained entrance to the residence, but she knew he was alone. She referred to the defendant as her cousin, and repeatedly stated, "I don't know why Randy would do such a thing to me or to my girl friend." Despite the efforts made on her behalf, Janet died at approximately 5:55 a.m.

Reeves I, 344 N.W.2d at 438-439.

Reeves subsequently was arrested and confessed to the rape and murder of Janet Mesner. *Id.*, 344 N.W.2d at 439.

State court proceedings

Reeves was charged with two counts of first degree murder under a felony murder theory. Neb. Rev. Stat. § 28-303 (1995).[1] The "predicate felony" of each of those

---

[1] "A person commits murder in the first degree if he kills another person (1) purposefully and with deliberate and

charges was the first degree sexual assault of Janet Mesner. Reeves pled not guilty and not guilty by reason of insanity.

A jury convicted Reeves of both counts of first degree murder. A three-judge sentencing panel then heard the penalty phase of the trial and ultimately sentenced Reeves to death for each murder.

The Nebraska Supreme Court, although it modified the mix of aggravating and mitigating circumstances to Reeves' benefit[2] and reweighed, ultimately affirmed Reeves' convictions and sentences of death on mandatory direct appeal[3] in *Reeves I*.

Reeves next sought collateral state postconviction relief.[4] The state trial court denied postconviction relief, the Nebraska Supreme Court affirmed that denial of relief and this Court granted certiorari ordering further review in light of the Court's recent decision in *Clemons v. Mississippi*. *State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359 (1990), *cert. granted*, 498 U.S. 964 (1990) (hereinafter "*Reeves II*").

Pursuant to this Court's order, the Nebraska Supreme Court again considered Reeves' complaints in view of *Clemons* and again affirmed denial of postconviction

---

premeditated malice, or (2) in the perpetration of or attempt to perpetrate any sexual assault in the first degree, arson, robbery, kidnapping, hijacking of any public or private means of transportation, or burglary . . . "

[2] In the Nebraska Supreme Court's de novo review of Reeves' sentences that court gave Reeves the benefit of an additional mitigating circumstance denied him at his trial level sentencing. *Reeves I*, 344 N.W.2d at 448.

[3] Neb. Rev. Stat. § 29-2525 and § 29-2528 (1995).

[4] Neb. Rev. Stat. § 29-3001 et seq. (1995).

relief. *State v. Reeves*, 239 Neb. 419, 476 N.W.2d 829 (1991), *cert. denied*, 506 U.S. 837 (1992) (hereinafter "*Reeves III*").

Federal habeas review

In July 1990 Reeves filed his first federal habeas corpus petition and obtained a stay of execution.

In December 1994 the United States District Court for the District of Nebraska (hereinafter "district court") first granted Reeves relief, upon a claim not at issue here.[5]

On appeal to the United States Court of Appeals for the Eighth Circuit (hereinafter "circuit court") the district court's grant of relief was reversed and the matter remanded for consideration of Reeves' remaining claims. *Reeves v. Hopkins*, 76 F.3d 1424 (8th Cir. 1996).

On remand the district court again granted Reeves' relief upon yet another claim not at issue here.[6] On appeal the circuit court again reversed the district court's grant of relief. However, the circuit court concluded that Reeves' *Beck v. Alabama*, 447 U.S. 625 (1980) claim, upon which the district court had denied Reeves habeas relief, merited relief and ordered Reeves either resentenced to life imprisonment or retried. Joint Appendix (hereinafter "JA") pp. 63-64.

The Warden's motion for rehearing and suggestion for rehearing en banc was denied by the circuit court. JA 65.

---

[5] *Reeves v. Hopkins*, 871 F.Supp. 1182 (D.Neb. 1994).

[6] *Reeves v. Hopkins*, 928 F.Supp. 941 (D.Neb. 1996).

SUMMARY OF THE ARGUMENT

Beck v. Alabama holds that the Eighth Amendment to the Constitution of the United States prohibits forcing a jury to choose between acquittal and death, if lesser included offenses are available under state law. This stark choice distorts the jury's determination of guilt. This distortion leads to arbitrary and capricious infliction of the death penalty. Imposition of the death penalty in this manner, without standards to guide the penalty determination, is cruel and unusual according to *Beck*.

Nebraska's death penalty law does not violate *Beck* because the jury *never* chooses between acquittal and death. The jury is required to focus on one issue – guilt or innocence of felony murder. The jury neither imposes nor recommends a sentence. Thus, the Nebraska system satisfies the concerns of the *Beck* decision to the maximum extent possible.

The Eighth Circuit's radical new rule that a jury must be instructed on lesser *non-included* offenses is without constitutional precedent. It allows the court or the defendant to choose what charges the executive branch prosecutor must file and prove. No provision of the Constitution requires that every rapist must also be charged with indecent exposure and every burglar with possession of burglary tools. This new rule will add thousands of habeas corpus cases to the federal docket as criminals seek new trials because they were not charged with some lesser offense.

In any event, this radical new constitutional rule is not applicable to Reeves because his conviction became

final in 1984, 12 years before the circuit court's announcement of this new rule.

ARGUMENT

QUESTION 1:

A CONFLICT AMONG THE CIRCUITS

I.

The question

This Court granted a writ of certiorari upon this issue:

> The opinion of the Eighth Circuit Court of Appeals creates a direct and admitted conflict with the opinion of the Ninth Circuit Court of Appeals in *Greenawalt v. Ricketts*, 943 F.2d 1020, 1029 (9th Cir. 1991), *cert. denied*, 506 U.S. 888 (1992) which requires resolution.

Petition for Writ of Certiorari, #96-1693, Question 1.

II.

The conflict

The Eighth Circuit's opinion specifically acknowledges that its resolution of this case is in direct conflict with the opinion of the United States Court of Appeals for the Ninth Circuit issued in *Greenawalt v. Ricketts*, 943 F.2d 1020, 1029 (9th Cir. 1991), *cert. denied*, 113 S.Ct. 252 (1992). The Eighth Circuit opinion does not distinguish the facts or law of *Greenawalt* from those presented by

Reeves' claim here.[7] The Eighth Circuit's disagreement could not be more straightforward: "We cannot agree with [the *Greenawalt*] interpretation of the *Beck* doctrine." JA 54.

Since the issuance of the circuit court's opinion in *Reeves*, the Ninth Circuit has reaffirmed its determination that *Greenawalt* represents a proper application of *Beck*. "Although it may be reasonably disputed, *Reeves* does not persuade us that we erroneously resolved Greenawalt's *Beck* claim." *Greenawalt v. Stewart*, 105 F.3d 1268, 1278 (9th Cir. 1977).[8]

QUESTION 2:

OUR FEDERAL CONSTITUTION DOES NOT REQUIRE THAT CRIMINAL DEFENDANTS RECEIVE JURY INSTRUCTIONS UPON "LESSER" OFFENSES, WHERE NO "LESSER INCLUDED" OFFENSES OF THE CRIME CHARGED EXIST UNDER STATE LAW

I.

The question

This Court also granted a writ of certiorari upon this question:

---

[7] The district court found the Ninth Circuit's reasoning and result in *Greenawalt* to be dispositive of this claim. "Judge Piester explicitly relied upon a Ninth Circuit case that was nearly on 'all fours' with this case." Cert. App, 18.

[8] Greenawalt was executed by the State of Arizona in January 1997, after the *Reeves* opinion was released and after Greenawalt had specifically called the conflict created by the decision in *Reeves* to this Court's attention. See *Greenawalt v. Stewart;* ___ U.S. ___, 117 S.Ct. 794, 136 L.Ed.2d 735 (1997) (denying Greenawalt's application for a stay of his execution).

> May a federal court require a state court, in a first degree murder case being prosecuted under a traditional felony murder theory, to ignore state substantive law and instruct its guilt phase juries on lesser homicide offenses which have never been recognized as lesser included offenses of first degree felony murder, in order to satisfy this Court's ruling in *Beck v. Alabama*?

Petition for Writ of Certiorari, #96-1693, Question 2.

II.

Introduction

The State of Nebraska's understanding of *Beck* is that the Eighth Amendment's ban on cruel and unusual punishment is violated when *a jury* must choose between acquittal and death. *Beck* teaches that this stark choice creates an unreliable jury decision concerning the defendant's guilt. If this understanding of *Beck* is correct, then the Eighth Circuit's decision is clearly wrong.

A.

In *Beck*, a lesser included offense existed under state law, but a special statute prohibited a jury instruction on that lesser included offense in a capital murder case. Here it has been the substantive law of the State of Nebraska for a century that second degree murder and manslaughter are not lesser included offenses of first degree felony murder.

B.

In Nebraska, the jury has no role in sentencing. The jury determines whether the defendant is guilty or not guilty of the crime charged. The court, in a separate proceeding, then determines whether the appropriate sentence is life in prison or death. A Nebraska jury is *never* faced with a decision of acquittal or death.

C.

The circuit court's grant of relief to Reeves is *not* based upon the concept of lesser "included" offenses at all, for it is clear that under Nebraska substantive law there exist no lesser included homicide offenses of first degree murder charged under a felony murder theory. Instead, the circuit court ordered relief upon a totally new and distinct premise: That Reeves has a federal constitutional entitlement to jury instructions upon crimes which are *not* lesser included offenses of the crime charged, but crimes which merely merit "lesser" punishments under Nebraska law.[9]

That theory, if not rejected here, will have a significant and disruptive impact upon the process by which criminal trials are conducted in the country.

D.

The opinion below demonstrates the need for this Court to clarify that *Beck* and its progeny are based on the

[9] "State law . . . may not prohibit an instruction on a noncapital charge . . . " JA 59.

unique concerns of the Eighth Amendment in cases in which death is a potential punishment, not the Due Process Clause.

III.

***Beck v. Alabama* has been limited to its "unique" facts**

Nebraska does not ask that *Beck v. Alabama*, 447 U.S. 625 (1980) be overruled. However, the ruling of *Beck* has been and should continue to be limited to its facts which the Court characterized as utterly "unique".[10] Each of the Court's cases which have followed *Beck*, have described situations to which the ruling in *Beck* does not apply. *Hopper v. Evans*, 456 U.S. 605 (1982) (*Beck* does not apply where the record will not support a lesser included offense instruction); *Spaziano v. Florida*, 468 U.S. 447 (1984) (*Beck* has no application where the statute of limitations had run on the lesser included offense); *Schad v. Arizona*, 501 U.S. 624 (1991) (*Beck* has no application where a lesser included offense existed under state law and an instruction was given upon it). This case should hold that *Beck* does not apply where no lesser included homicide offense exists under state law, the jury plays no role in sentencing, and a life sentence without parole is an option for the sentencing judge.

[10] *Beck*, at 635.

IV.

The holding in *Beck* is only applicable when lesser included offenses of the crime charged are recognized under state law

Beck and this Court's decisions which rely upon it, *Hopper v. Evans*, 456 U.S. 605 (1982), *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Schad v. Arizona*, 501 U.S. 624 (1991), *all* analyze this constitutional claim within the context of the well understood criminal law concept of "lesser included offenses". They do not go beyond it.

The pivotal fact in *Beck* was that a lesser included offense of the crime charge was recognized by state substantive law, but a state statute specifically prohibited its use solely in capital cases.[11]

Thus, the test employed by *Beck* in determining whether a lesser included offense instruction must be given should be pivotal to our analysis here.

A.

The *Beck* test

Beck employed a two-step analysis to determine if a lesser included offense instruction should be given: (1) Is the crime upon which instruction is requested recognized by state law as a lesser included offense of the crime charged? (2) If so, would the evidence at trial support a

---

[11] *Beck* at 628.

theory that the defendant was not guilty of the crime charged but guilty of a lesser included offense?[12]

B.

Nebraska substantive law does not recognize second degree murder or manslaughter as lesser included offenses of the crime of first degree felony murder

The first step of *Beck*'s lesser included offense analysis requires a determination of existing state substantive law: Are the crimes upon which instructions are requested lesser included offenses of the crime charged?

The Nebraska Supreme Court has for 100 years consistently held that second degree murder and manslaughter are *not* lesser included offenses of the crime of first degree murder committed under a felony murder theory. *E.g., Morgan v. State*, 51 Neb. 672, 71 N.W. 788 (1897); *State v. Price*, 252 Neb. 365, 562 N.W.2d 340, 346 (1997).

The state trial court denied and the Nebraska Supreme Court affirmed the refusal to give Reeves' jury requested instructions on second degree murder and manslaughter specifically because second degree murder and manslaughter had, for a century, been specifically recognized as *not* being lesser included offenses of first degree felony murder. *Reeves I*, 344 N.W.2d at 442. Those offenses do not "exist" as lesser included offenses under Nebraska substantive law. Thus, Reeves' request fails at the first step of the *Beck* test.

---

[12] *Beck* at 635-637. To the same effect, *State v. Heubner*, 245 Neb. 341, 513 N.W.2d 284 (1994).

Without explanation, the circuit court did not engage in this crucial first step of the *Beck* opinion's lesser included offense analysis.

C.

Spaziano instructs that there is no constitutional entitlement to instructions upon nonexistent lesser included offenses of the crime charged

1.

In *Spaziano* the Court faced a situation very similar to that before us here but arrived at a result quite different from that reached by the circuit court. In *Spaziano* the Court stated:

> Where no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the process. *Beck* does not require that result.

Id., 468 U.S. at 455. This is the same conclusion reached by the Ninth Circuit in *Greenawalt*.[13]

2.

In *Spaziano*, lesser included offenses were recognized under state law, but their prosecution was barred by the applicable statute of limitations at the time of trial. Under that circumstance did our federal constitution prevent Spaziano's jury from considering his guilt solely of the crime of felony murder? It did not. Did that fact prevent

[13] *Greenawalt*, 943 F.2d at 1029.

the ultimate imposition of a sentence of death? It did not. This case merits the same result reached in *Spaziano*.

3.

The evil observed by the Court in the Alabama trial scheme at issue in *Beck* was a statute that prohibited the consideration of a lesser included offense, otherwise recognized by state law, *only* when the crime charged was capital.[14]

In stark contrast to the situation in *Beck*, here no Nebraska legislation denied Reeves an instruction upon an otherwise recognized lesser included offense. Instead, the instruction Reeves requested was refused because under a century of Nebraska law, the offenses upon which Reeves requested an instruction were not lesser included offenses of the crime with which he was charged.

4.

The circuit court's opinion attempts to analogize a century of Nebraska Supreme Court holdings that second degree murder and manslaughter are not lesser included offenses of felony murder with the affirmative legislative prohibition of instructions upon an otherwise recognized lesser included offense in *Beck*.[15] However, if the circuit court's analysis is correct, then the same constitutional

[14] However, that crime was not second degree murder or manslaughter, but non-capital felony murder. *Beck* at 628.

[15] JA 57, fn. 11.

concern would have been observed with respect to the state statute of limitations which had run in *Spaziano*, but it was not.

The Court's holding in *Spaziano* provides a clear message: If no lesser included offenses exist at the time of trial, our federal constitution does not require that instructions be given upon non-existent or unavailable lesser included offenses nor does it prevent the eventual imposition of a sentence of death for the crime charged. As another circuit court has observed:

> We do not read *Beck* or any other case as establishing a constitutional requirement that states create a noncapital murder offense for every set of facts under which a murder may be committed.

Hatch v. Oklahoma, 58 F.3d 1447, 1454 (10th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1881 (1996).

In the *Beck* opinion itself the Court cited with approval *State v. Valencia*, 121 Ariz. 191, 589 P.2d 434 (1979) in which a capital sentence was affirmed in the face of a complaint that a lesser homicide instruction should have been given. *Id.*, 447 U.S. at 636, n.12.

D.

The federal courts are not free to re-write state substantive law

It is clear from the circuit court's opinion that an attempt has been made to alter the substantive law of the State of Nebraska. Either the circuit court has ignored the substantive law of Nebraska on the subject of available

lesser included offenses, or it has re-written Nebraska substantive law and created a class of lesser but not included offenses upon which jury instructions are now constitutionally required.

It is an unconstitutional exercise of the federal judicial power for a circuit court to ignore or re-write the substantive law of any state. For a federal court to take a dispositive position on a question of state law contrary to the highest court of that state would be a significant affront to concepts of comity and federalism. *Johnson v. Fankell*, 520 U.S. ___, 117 S.Ct. 1800, 138 L.Ed.2d 108, 115 (1997), citing *New York v. Ferber*, 458 U.S. 747 (1982).

E.

The second element of the *Beck* test is not met by Reeves

Although failure to meet the first step of the *Beck* lesser included offense analysis is dispositive of the question, we note that Reeves also fails to meet the second element of the *Beck* analysis: Would the evidence at trial have supported guilt of the lesser included offense but acquittal of the crime charged?

Although the Nebraska Supreme Court appropriately resolved Reeves' request for lesser included offense instructions at the first step of the *Beck* analysis, the Nebraska trial court rejected Reeves request for lesser included offense instructions upon the second ground as well.[16]

---

[16] JA 3.

Reeves' *sole* defense at trial was that his level of voluntary intoxication was such that he did not have the capacity to understand what he was doing or to understand the nature or quality of his acts. *Reeves I*, 344 N.W.2d at 440.

Thus, if Reeves' jury had accepted his theory of the case and found him to be not responsible of first degree felony murder by reason of insanity, that same finding would have exonerated Reeves of responsibility for any criminal acts, including second degree murder and manslaughter. JA 21. Reeves' only theory of the case would have prevented his being found guilty of *any* criminal offense.

Therefore, Reeves' case fails to satisfy either aspect of the *Beck* tests for when the giving of lesser included offense instructions is appropriate. The *record* would not have supported the giving of a lesser included offense instruction even if lesser included offenses had existed under Nebraska law. This court has already faced that scenario and denied relief in *Hopper v. Evans* at 613.

V.

The role of a Nebraska jury is utterly distinct from the unique role imposed upon the Alabama jury in *Beck*

At the outset we note that *Beck* is the only case in which this court perceived the problem it there remedied. *Beck* addressed an Alabama trial and sentencing scheme both unique to American law[17] and remarkably distinct

[17] *Beck*, at 635.

from the Arizona and Nebraska systems at issue in *Greenawalt* and here. The Nebraska and Arizona processes for determining the guilt of, and the appropriate punishment for, a first degree murder are so fundamentally different from the Alabama statutes at issue in *Beck* that *Beck* simply does not dictate a grant of relief in this case.

Beck is, first and foremost, about the choices and responsibilities imposed upon juries by state law. The State of Nebraska simply does not place upon its juries responsibilities even remotely analogous to those demanded of the jury in *Beck*.

A.

The Nebraska crime of first degree murder

The Nebraska Legislature has (1) defined no crime as "capital murder", (2) defined no crime for which, at the conclusion of the guilt phase proceeding, a guilty prisoner may accurately be deemed "death eligible", and (3) defined no crime for which a jury, having found the defendant guilty, is mandated to impose a sentence of death.

Neb. Rev. Stat. § 28-303 (Reissue 1995) defines the crime of first degree murder, and establishes its potential range of punishment, as follows:

> A person commits murder in the first degree if he kills another person (1) purposely and with deliberate and premeditated malice, or (2) in the perpetration of or attempt to perpetrate any sexual assault in the first degree, arson, robbery, kidnapping, hijacking of any public or private means of transportation, or burglary, or (3) by

> administering poison or causing the same to be done; or if by willful and corrupt perjury or subornation of the same he purposely procures the conviction and execution of any innocent person. The determination of whether murder in the first degree shall be punished as a Class I or Class IA felony shall be made pursuant to sections 29-2520 to 29-2524.

A Class I felony is punishable by death. A Class IA felony is punishable by life imprisonment without possibility of parole.[18] Neb. Rev. Stat. § 28-105 (Reissue 1995).

As required by § 28-303, the determination of the appropriate punishment for a prisoner found guilty of first degree murder is taken up *exclusively* in a distinct, post-guilt phase of a Nebraska first degree murder trial. Neb. Rev. Stat. § 29-2521 and § 29-2522 (Reissue 1995).

Furthermore, the determination of an appropriate punishment is an exclusively judicial function. Neb. Rev. Stat. § 29-2520 (Reissue 1995).

B.

The role of Nebraska juries in first degree murder cases

The role of a jury in any Nebraska criminal case is limited exclusively to determining whether the defendant has been proven guilty beyond a reasonable doubt of the

---

[18] Before a Nebraska prisoner sentenced to life for first degree murder may become parole eligible, his original life sentence must be commuted by the State of Nebraska Board of Pardons to a term of years.

crime charged. Nebraska juries are never placed in a *Beck*-like, death-or-acquit situation for two distinct reasons.

1.

First, Nebraska law never burdens its juries with any responsibility for the determination of the appropriate punishment for any crime. Neb. Rev. Stat. § 29-2261 (1995); Neb. Rev. Stat. § 29-2522 (1995).

Reeves' jury was twice instructed upon that fact. At Reeves' trial both the venire from which Reeves' jury was chosen and the jury actually seated to determine whether the State had proven Reeves' guilt beyond a reasonable doubt were accurately instructed as follows:

> You have nothing whatsoever to do with the punishment or disposition of the defendant in the event of his conviction or acquittal by reason of insanity. Therefore, in determining his guilt or innocence, you have no right to take into consideration what punishment or disposition he may or may not receive in the event of his conviction or in the event of his acquittal by reason of insanity.

JA 2 and 24.

Thus, *Beck*'s concern with the pressures placed upon Alabama jurors by that state's "death or acquit" trial and sentencing scheme, and the potential distortion of the guilt phase factfinding process which could result from it, are simply not legitimate concerns with respect to the Nebraska statutory process at issue here.

2.

Second, when a Nebraska jury finds a defendant guilty of first degree murder, that guilt phase determination is *never* dispositive, advisory or even afforded weight in the subsequent penalty phase process by which the appropriate penalty for that crime is judicially selected. Neb. Rev. Stat. § 29-2523 (Reissue 1995).

Thus, the *Beck* opinion's recognition that the potential distortion of the factfinding process created by the unique Alabama system might well not be corrected by subsequent judicial action,[19] again is not presented by Nebraska's distinct, two-step, guilt and punishment process.

C.

The circuit court significantly misapprehended the statutory roles of both Reeves' jury and the Alabama jury in *Beck* and thus failed to distinguish between them

The circuit court's grant of habeas relief to Reeves is based upon several significant misconceptions of both the situation in which Beck's jury found itself, and the distinct reality of a Nebraska jury's role in the guilt and penalty phase process of a first degree murder prosecution.

1.

The circuit court apparently concluded either that Beck's jury was aware of the fact that their mandatory

[19] *Beck* at 645.

death verdict was not the final word upon the fate of the defendant, or that Alabama law, rather than the Beck jury's *understanding* of Alabama law, prompted the result in *Beck*.[20] Neither conclusion is accurate.

First, Alabama juries were specifically *not* informed that the state trial court had the authority, under Alabama statutes, to override their mandatory verdict of death.

> The jury is not told that the judge is the final sentencing authority. Rather, the jury is instructed that it must impose the death sentence if it found the defendant guilty and is led to believe, by implication, that its sentence will be final.

Beck, at 639, fn. 15.

> [Alabama] jurors were instructed to impose the death sentence if they concluded that the defendant was guilty, and *they were not told that the trial judge could reduce the sentence to a sentence of life imprisonment.*

Hopper v. Evans, 456 U.S. at 608 (1982) (emphasis added).

Second, it was the realities *as understood by Beck's jury* at the time they undertook their factfinding responsibilities that was the Court's sole concern in *Beck*.

> In the final analysis the difficulty with the Alabama statute is that it interjects irrelevant considerations into the factfinding process, *diverting*

[20] JA 60-61, fn. 13.

> *the jury's attention* from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty . . .

Beck, at 642 (emphasis added).

Therefore, from the all important standpoint of Beck's jury, they reasonably understood themselves to be, in fact, confronted with the acquit-or-vote-death situation the Court found unacceptable. Contrary to the circuit court's conclusion, Reeves' jury was never placed in that situation nor given the impression that they had such a role in Reeves' trial. Reeves' jury was specifically instructed to the contrary.[21]

2.

The circuit court also bases its result upon its conclusion that *Beck* cannot be distinguished from Nebraska law because neither case involved crimes requiring a mandatory sentence of death.[22]

Contrary to the circuit court's conclusion, the Court in *Beck* noted that, from the all important standpoint of Beck's jury, the unique Alabama statutory scheme maintained or resurrected a form of mandatory death penalty which the Court had already found constitutionally infirm.

> The Alabama statute, which was enacted after Furman but before Woodson, has many of the same flaws that made the North Carolina statute

---

[21] JA 2 and 24.

[22] JA 60-61, fn. 13.

> unconstitutional. Thus, the Alabama statute makes the guilt determination depend, at least in part, on the jury's feelings as to whether or not the defendant deserves the death penalty, without giving the jury any standards to guide its decision.

Beck, at 640.

3.

The circuit court also based its grant of habeas relief to Reeves upon the conclusion that the mandatory sentence of death required by the statutory scheme in *Beck* could not be distinguished from Nebraska's guilt and penalty phase process.[23]

Contrary to the circuit court's conclusion, the Court in *Beck* specifically recognized that the jury's mandatory verdict of death was routinely dispositive of the defendant's fate.

> [I]t is fair to infer that the jury verdict [regarding punishment] will ordinarily be followed by the judge **even though** he must hold a separate hearing in aggravation and mitigation before he imposes sentence.

Beck at 645 (emphasis added).

---

[23] JA 60-61, fn. 13.

Under Nebraska law, not only is the jury given no role in the determination of a guilty defendant's punishment, but the considerations relevant to the determination of an appropriate penalty for a first degree murder are wholly independent of the considerations weighed in the jury's determination of guilt. See Neb. Rev. Stat. § 29-2522 and § 29-2523 (Reissue 1995).

4.

The circuit court also saw similarities between the Alabama sentencing process at issue in *Beck* and Nebraska's guilt and penalty phase process on the question of "death eligibility". See *Tuilaepa v. California*, 512 U.S. 967, 972-975 (1994).

> This case is like *Beck*: [The Nebraska] jury had no ultimate control over the imposition of a death sentence and could only choose to convict Reeves of a death-eligible crime or to acquit him.

Reeves v. Hopkins, 102 F.3d 977, 985, fn. 13. JA 60-61

a.

First, we agree that Reeves' jury had no "control" over the selection of his appropriate penalty under Nebraska law. However, that is not because Reeves' jury was commanded to return a mandatory sentence of death, but because Reeves' jury had no role whatsoever in the determination of Reeves' penalty. The distinction between the two situations could not be greater.

b.

Second, as we have previously noted, under Nebraska law an individual found guilty of first degree murder is not rendered "death eligible" merely by that determination. Much remains to be considered. Before a guilty first degree murderer in Nebraska becomes "death eligible", the State must, during a separate penalty phase proceeding, (1) prove beyond a reasonable doubt the existence of one or more statutory aggravating factors,[24] *and* (2) convince the sentencing court the weight afforded those factors, standing alone, "justif[ies] imposition of a sentence of death." Neb. Rev. Stat. § 25-2523 (Reissue 1995).

VI.

The circuit court opinion dramatically widens the application of *Beck* by expanding the holding of *Beck* from "lesser included offenses" to offenses which merely merit "lesser" punishment

While *Beck* turns upon the concept of "lesser included offenses", the circuit court's order of federal habeas relief does not. In this respect the circuit court opinion makes a radical departure from the logic of *Beck* and the cases which have followed it at a very crucial juncture of the analysis.

---

[24] Neb. Rev. Stat. § 29-2523 (Reissue 1995).

A.

The new concept

The circuit court's grant of relief to Reeves is *not* based upon the concept of lesser "included" offenses at all. Instead, the circuit court ordered relief upon a totally new and distinct premise: That Reeves has a federal constitutional entitlement to jury instructions upon crimes which are *not* "lesser included offenses" of the crime charged, but crimes which merely merit "lesser" punishments under Nebraska law.[25] That action presents significant constitutional implications far beyond those reasonably anticipated by *Beck*.

Because the definition of what constitutes a "lesser included offense" is common to both federal and Nebraska law,[26] and because the concept of "lesser included offenses" is a universally employed concept of American criminal law,[27] caution must be employed before expanding the constitutional significance of that concept beyond *Beck*, or attaching constitutional significance to the geometrically broader concept of crimes

---

[25] "State law . . . may not prohibit an instruction on a noncapital charge . . . " JA 59.

[26] See *Schmuck v. U.S.*, 489 U.S. 705 (1989) and *State v. Coburn*, 218 Neb. 144, 352 N.W.2d 605, 608 (1984); *State v. Null*, 247 Neb. 192, 526 N.W.2d 220, 228 (1995).

[27] In *Beck* the Court noted "the nearly universal acceptance [of the availability of lesser include offenses] in both state and federal courts . . . " *Id.*, at 637. See also Shellenberger and Strazzella, "The Lesser Included Offense Doctrine and The Constitution: The Development of Due Process and Double Jeopardy Remedies", *Marquette Law Review*, Vol. 79, Fall 1995, fn. 2.

which merely merit lesser punishments. Yet the latter course is the one adopted by the circuit court without explanation.

B.

The disruption

The concept urged by the circuit court would fundamentally disrupt the orderly trial and logical resolution of most criminal proceedings in this country.

Under our American system of criminal justice it is the State, not the defendant, which selects the crime to be charged and thus the elements which the State assumes the burden to prove.

> At common law the jury was permitted to find the defendant guilty of any lesser offense *necessarily included in the offense charged*. This rule originally developed as an aid to the prosecution in cases in which the proof failed to establish some element *of the crime charged*.

Beck at 633 (emphasis added).

We are aware of no authority permitting a criminal defendant to place upon the State the burden of proving crimes, or the elements of crimes, distinct from the elements of the crime the State has selected to prosecute. Yet that is *exactly* the result of the circuit court's opinion.

Admittedly second degree murder and manslaughter are offenses which under Nebraska law merit "lesser" punishment than does first degree felony murder, but they are not lesser "included" offenses of the crime with

which Reeves was charged.[28] Trespassing, breaking and entering, and indecent exposure are all offenses arguably committed by Reeves in the course of the events at issue here, but those were not the offenses the State of Nebraska elected to prosecute.

Under *Schmuck v. U.S.* the appropriate query is: Are *all* of the elements of the lesser crime upon which the defendant desires instructions *included* among the elements of the greater crime the State has elected to prosecute? If they are, then the State's burden is not increased by the giving of the lesser included offense instructions.

However, if our constitution requires that merely "lesser" offenses be instructed upon, then crimes for which the State has assumed no burden of proof and elements which are *not* elements of the crime charged are, for the first time, placed at issue *after* the close of all evidence. This practice would lead to the same type of

---

[28] There did exist a "lesser included offense" of the crimes with which Reeves was charged. The offense of first degree sexual assault was clearly a lesser included offense of the crimes with which Reeves was charged, it was the predicate felony upon which the felony murder charges were based. *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 159, 178 (1997). Yet Reeves *did not ask* for instructions upon the only lesser included offense recognized by Nebraska law. Instead, Reeves' request a lesser included offense instruction upon crimes which, for a century, had been recognized as *not* being a lesser included offense of the crime charged. Reeves' strategic choice in that regard denied Reeves the opportunity to have his jury instructed upon an available lesser included offense – a "third option" – meriting punishment less severe than the range of punishment established for the first degree murder with which he was charged. See *Schad v. Arizona*, 501 U.S. 624, 647-648 (1991).

illogical trial and jury deliberation process rejected by the Court in *Spaziano*. Attaching constitutional significance to that concept would geometrically exacerbate the problem.

Neither *Beck* nor *Hopper* nor *Spaziano* nor *Schad* command, discuss or even consider this unique concept of criminal law.

VII.

The constitutional basis for the holding in *Beck* should be clarified

A.

Beck is an Eighth Amendment case

One of the unanswered questions regarding the holding in *Beck* and its application through *Hopper, Spaziano* and *Schad* is whether those cases are founded upon the requirement for uniquely stringent factfinding in capital cases under the Eighth Amendment or whether the result is based upon the Due Process Clause.[29]

Beck states that "we have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process". *Beck* at 637. We observe in *Hopper, Spaziano* and *Schad* no articulated deviation from that statement.

We believe the result in *Beck* was prompted by Alabama's unique statutory scheme which inextricably linked the guilt and penalty decisions and required a jury to choose between acquittal and death. In that respect,

---

[29] See Shellenberger and Strazzella, pages 39-114.

Beck can accurately be viewed as a mopping up exercise to bring Alabama law into accord with the Court's prior ruling in *Woodson v. North Carolina*, 428 U.S. 280 (1976). "[The Alabama statutory scheme] has many of the same flaws that made the North Carolina statute unconstitutional."[30]

Because Beck's jury perceived that a death penalty was mandatory[31] upon finding the defendant guilty of the crime charged

> the Alabama statute makes the guilt determination depend, at least in part, on the jury's feelings as to whether or not the defendant deserves the death penalty, *without giving the jury any standards to guide its discretion.*

Beck at 640.

Thus, it would appear that only in the unique circumstance where the guilt determination mandates the imposition of a death sentence, does the denial of an instruction upon an otherwise available lesser included offense take on constitutional import. This would explain the fact that this Court has never applied *Beck* beyond cases involving its unique, Eighth Amendment capital jurisprudence. The implications of basing *Beck* on other than Eighth Amendment concerns are significant and the circuit courts appear to be split upon that issue.[32]

---

[30] *Beck* at 640.

[31] *Beck* at 641.

[32] See cases collected at Shellenberger and Strazzella, pages 63-69.

B.

The ramifications of characterizing *Beck* as a holding based upon the Due Process Clause

The principal problem presented by not resolving the confusion that the result in *Beck* is based upon solely Eighth Amendment concerns, is that if the result in *Beck* is announced to be founded upon the Due Process Clause rather than the Eighth Amendment, then its application cannot logically be restrained within the context of "capital cases", and the States' lesser included offense practice will have been federalized. That act requires serious forethought.

1.

The States, while generally uniform in their use of the concept of lesser included offenses are not at all uniform in the process by which lesser included offenses are defined. At least three distinct methodologies are employed.[33] If our federal constitution is extended to this question, what are the constitutional implications of these varying practices?

Pragmatically, the potential constitutionalization of this widespread state criminal law procedure will dramatically increase the number of cases and number of claims subject to federal review under 42 U.S.C. § 2254.

---

[33] Shellenberger and Strazzella, pp. 7-13.

2.

Those are some of the concerns raised if federal constitutional protection were extended, *but limited to*, the States' lesser included offense practice. But that is not what the circuit court opinion purports to do. It goes much farther.

The circuit court opinion extends the protection of our federal constitution well beyond lesser "included" offenses, to *all* offenses which merely merit lesser punishment. The problems which flow from that extension are geometrically more complicated.

As opposed to lesser included offense practice, with which the state and federal courts have experience, the circuit court opinion casts both the state and federal courts into wholly uncharted waters. How will the state and federal courts define merely "lesser" offenses? In almost every crime scenario imaginable there are many "lesser" crimes committed by the defendant in the course of achieving the theft or rape or robbery or murder which the state has elected to prosecute. Do all of those crimes now not only come into play at trial, but take on constitutional import as well? The disruption to the orderly progress of proof at trial and the confusion injected into the jury's guilt determination process would make the concerns for the rationality of our criminal justice system voiced by the Court in *Spaziano* appear trivial.[34]

---

[34] *Spaziano*, at 456.

QUESTION 3:

THE RULING OF THE CIRCUIT COURT REPRESENTS A "NEW RULE" UNDER *TEAGUE V. LANE*

I.

The question

This Court also granted a writ of certiorari upon this question:

> Is the rule announced by the circuit court a "new rule" under *Teague v. Lane*?

Petition for Writ of Certiorari, #96-1693, Question 4.

A.

Teague v. Lane

In *Teague v. Lane*, 489 U.S. 288 (1989), this Court announced, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S. at 310.

In *Lambrix v. Singletary*, ___ U.S. ___, 117 S.Ct. 1517, 1524, 137 L.Ed.2d 771 (1997) this Court described the three-step process by which a *Teague* analysis must be undertaken. First, one must determine the date upon which the habeas petitioner's conviction became final. Second, one must survey the legal landscape and determine whether a state court, considering the petitioner's claim at the time his conviction became final, would have felt *compelled* by existing precedent to conclude that the rule the prisoner now seeks the benefit of was required by the Constitution. Finally, if one determines by this

process that the prisoner seeks the benefit of a "new rule", one must then consider whether the relief sought falls within one of two narrow exceptions.

> [*Teague*] asks whether [the rule in question] was *dictated* by precedent – i.e., whether *no other* interpretation was reasonable. We think it plain from the above that a jurist considering all the relevant material (and not, like the dissent, considering only the material that favors [the result urged]) could reasonably have reached a conclusion contrary to our holding in that case. Indeed, both before and after Lambrix's conviction became final, every court decision we are aware of did so.

Lambrix, 117 S.Ct. at 1530.

Also last term this Court described the *Teague* standard as follows:

> [W]e will not disturb a final state conviction or sentence unless it can be said that a state court, at the time the conviction or sentence became final, would have acted objectively unreasonably by not extending the relief later sought in federal court.

O'Dell v. Netherland, ___ U.S. ___, 117 S.Ct. 1969, 1973, 138 L.Ed.2d 351 (1997).

II.

The analysis

A.

The date Reeves' sentences became final

Pursuant to Nebraska law,[35] Reeves was afforded a mandatory direct appeal of his convictions and sentences of death. *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984), *cert. denied*, 469 U.S. 1028 (1984).

That judgment became final with this Court's denial of Reeves' petition seeking a writ of certiorari on November 13, 1984. *Reeves v. Nebraska*, 469 U.S. 1028 (1984).

B.

The legal landscape

1. In Nebraska

Although *Beck* was decided by this Court in 1980, no discussion of *Beck* is found in Nebraska jurisprudence until the Nebraska Supreme Court's decision in *State v. Masters*, 246 Neb. 1018, 524 N.W.2d 342 (1994).[36]

In *Masters* the Nebraska Supreme Court held:

> Masters cites *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), and *Schad v. Arizona*, 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991), as authority for the proposition that

---

[35] Neb. Rev. Stat. § 29-2525 (1995).

[36] Reeves argued *Beck* to the Nebraska Supreme Court in the context of Reeves' lesser included offense claim both on his mandatory direct appeal and in his appeal from the denial of relief upon state collateral review.

lesser-included offenses to felony murder must be considered by the finder of fact. Both of these cases are distinguishable on their facts.

* * *

In the present case, the finder of fact was not presented with the "death-penalty-or-acquit" situation in *Beck*. To the contrary, under Nebraska law the issue of guilt or innocence is determined separately from the issue of sentencing. See Neb. Rev. Stat. § 29-2520 (Reissue 1989). . . . Thus, the risk which the Court found intolerable in *Beck* is simply not present in Masters' case.

* * *

> We find that Masters was not entitled to a lesser-included offense instruction under either *Beck* or *Schad*, there being no lesser-included offenses to felony murder under Nebraska law.

524 N.W.2d at 348-349.

Thus, the rule announced by the circuit court in 1996, that our federal constitution requires the giving of instructions upon lesser homicide offenses in all first degree murder prosecutions, regardless of whether there existed lesser *included* offenses of the crime charged under substantive state law, was not a part of the Nebraska legal landscape in 1984 when Reeves' judgments became final.

2. The national landscape

a.

The Eighth Circuit cites us to no authority of this Court which "dictates" the result that the panel reached in this case. The Eighth Circuit's acknowledgment of its diametric split with the Ninth Circuit on this question belies any argument that the Eighth Circuit's result was "compelled" by *Beck*.

Beyond that, there are several other aspects of the Eighth Circuit's opinion which render the panel's decision a "new" rule under *Teague*.

First, the Eighth Circuit's only citation of authority in support of its interpretation of *Beck* is to *Cordova v. Lynaugh*, 838 F.2d 764 (5th Cir. 1982). Yet *Cordova*, consistent with *Beck* and *Hopper* and this Court's subsequent opinion in *Spaziano*, speaks only in terms of the constitutional necessity of instructions upon "lesser *included* noncapital offenses"[37] (emphasis added) supported by the evidence. *Cordova* never adopts the remarkably broader concept of a right to instructions upon *any* "noncapital charge". That concept was first announced by the Eighth Circuit in 1996.

Second, even if *Cordova* had supported the Eighth Circuit's subsequent reading of *Beck*, certainly a decision of the Fifth Circuit would not have "dictated" that the Nebraska Supreme Court reach the same conclusion in 1984.

---

[37] 838 F.2d at 767.

Third, the circuit court apparently deemed it necessary to explain in some detail why prior authority in that circuit was not at odds with the rule they announced in the opinion below. JA 55, fn. 10. That effort further demonstrates that the result in *Reeves v. Hopkins* was not a foregone conclusion even within the Eighth Circuit in 1996.

b.

Certainly, the diametric conclusion previously reached and subsequently reaffirmed by the Ninth Circuit in the *Greenawalt* cases amply demonstrates that other interpretations of *Beck* are "reasonably possible". As the Ninth Circuit observed: "Although it may be reasonably disputed, *Reeves* does not persuade us that we erroneously resolved Greenawalt's *Beck* claim." *Greenawalt v. Stewart*, 105 F.3d 1268, 1278 (9th Cir. 1977).

c.

Thus, in addition to the Ninth Circuit, a Nebraska trial court judge, ten judges of the Nebraska Supreme Court,[38] a federal magistrate judge, and a federal district court judge all considered Reeves' *Beck* claim and did not feel "compelled" by the prior rulings of this Court to grant Reeves relief. These jurists not only did not find the result urged by Reeves to be "dictated", they found it to be without merit.

---

[38] Krivosha, McCown and Shanahan on *Reeves I*; Boslaugh, White, Hastings, and Caporale on both *Reeves I* and *Masters*; and Fahrnbruch, Lanphier and Wright on *Masters*.

3. A "new" rule

There seems to be no basis for legitimate dispute that the rule first announced by the Eighth Circuit in the opinion below, right or wrong, represents a "new" rule under *Teague*.

C.

The *Teague* exceptions do not apply

1.

The rule announced by the circuit court opinion does not place "a class of private conduct beyond the power of the State to proscribe".[39]

The Eighth Circuit stated: "There is nothing necessarily unconstitutional with the State's definition of the mental culpability required for a felony murder conviction." JA 58.

2.

The second exception is for "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding."[40]

As we have noted above, the facts which drove the reasoning and result in *Beck* simply are not present in the procedures by which the State of Nebraska determines a criminal defendant's guilt and appropriate punishment. First and foremost, under the Alabama system at issue in

---

[39] *Lambrix*, 117 S.Ct. at 1530-1531.

[40] *Lambrix*, 117 S.Ct at 1531.

Beck, the questions of guilt and punishment were inextricably linked. Under Nebraska law those two questions are answered independently, in two distinct proceedings, by two distinct entities.

Reeves' jury had only one question before it: Had the State proven Reeves' guilt of the murders charged beyond a reasonable doubt? Reeves' jury received specific instructions emphasizing their lack of involvement in the determination of Reeves' possible punishment and their responsibility solely to answer the question of Reeves' possible guilt.[41] The question of guilt having been answered, Reeves' jury was not forced to also impose a sentence of death, as did Beck's jury. Instead, Reeves' jury was *dismissed*.

Thus, while the Court's reasoning in *Beck* was couched in terms of a concern for the impact the unique Alabama capital sentencing scheme might have upon the "reliability of the guilty determination" aspect of an Alabama jury's factfinding,[42] that concern flowed directly and solely from the unique Alabama trial system which affirmatively denied Beck's jury any discretion with respect to the punishment to be imposed if guilt of the crime charged was found and inextricably tied a finding of guilt to a verdict of death. The trial scenario which gave rise to the Court's concerns in *Beck* is simply not presented by the guilt and sentencing process employed by the State of Nebraska.

---

[41] See Preliminary Jury Instruction #10 and Jury Instruction #29, found at JA 2 and 24 respectively.

[42] *Beck*, 447 U.S. at 638.

Furthermore, if the result in *Beck* is acknowledged to be based upon the unique Eighth Amendment concerns which arise solely in the context of capital penalty determinations,[43] then the Eighth Amendment's "heightened need for reliability"[44] disappears from guilt phase determinations when, as in Nebraska, a finding of guilt for the crime of first degree murder does not even render a defendant "death eligible", much less mandate a sentence of death.[45]

We understand the result in *Beck* to be dictated solely by Eighth Amendment concerns with the unique Alabama system which inalterably tied the jury's guilt determination to a mandatory verdict of death. That fact *alone* created the risk of distortion of the jury's factfinding function found constitutionally impermissible. *Beck* does not address the more common model of guilt and penalty phase systems, such as Nebraska's, where no such mandatory guilty/death nexus exists.

---

[43] "[W]e have invalidated procedural rules that tended to diminish the reliability of the sentencing determination [in capital cases]." *Beck*, 447 U.S. at 638.

[44] *Caldwell v. Mississippi*, 472 U.S. 320, 340 (1985) (citing *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion).

[45] See Neb. Rev. Stat. § 29-2522(1) (Reissue 1995) which provides as the first step of a three step penalty phase analysis: "Whether sufficient aggravating circumstances exist to justify imposition of a sentence of death." This penalty phase analysis represents the first occasion upon which consideration is given to whether the guilty defendant is "death eligible" under Nebraska law.

Therefore, the second exception of *Teague* is not applicable to this case.

CONCLUSION

The circuit court's opinion would dramatically and fundamentally alter the manner in which criminal cases are tried in this country. Neither our federal constitution, nor *Beck*, nor logic compel the result urged by the circuit court. The circuit court's opinion should be reversed and Reeves' request for habeas corpus relief denied.

Respectfully submitted,

DON STENBERG
Attorney General

J. KIRK BROWN
Counsel of Record
Assistant Attorney General
P.O. Box 98920
Lincoln, Nebraska 68509-8920
Tel: (402) 471-2682

(10)

No. 96-1693

In The

Supreme Court of the United States

October Term, 1997

FRANK X. HOPKINS,

Petitioner,

v.

RANDOLPH K. REEVES,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eighth Circuit

BRIEF FOR RESPONDENT

PAULA HUTCHINSON*
5815 S. 58th Street, Suite C3
Lincoln, NE 68516
(402) 420-2156

KENT GIPSON
Public Interest Litigation Clinic
5319 Rockhill Road
Kansas City, MO 64110
(816) 363-2795

TIMOTHY K. FORD
MACDONALD, HOAGUE & BAYLESS
705 2nd Avenue, Suite 1500
Seattle, WA 98104
(206) 622-1604

Attorneys for Respondent

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

59 pp

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

FEDERAL CASES

STATE CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATUTES

TABLE OF AUTHORITIES – Continued

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those provisions set forth in the Brief for Petitioner, this case involves the following provisions of the Constitution of the United States and the Revised Statutes of Nebraska:

The Fourteenth Amendment, which provides in part:

> Nor shall any State deprive any person of life- . . . without due process of law.

Neb. Rev. Stat. § 28-303, which provides in relevant part:

> A person commits murder in the first degree if he kills another person (1) purposely and with deliberate and premeditated malice, or (2) in the perpetration of or attempt to perpetrate any sexual assault in the first degree, arson, robbery, kidnapping, hijacking or any public or private means of transportation, or burglary.

Neb. Rev. Stat. § 28-304, which provides in relevant part:

> A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation.

Neb. Rev. Stat. § 28-305, which provides in relevant part:

> A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act.

Neb. Rev. Stat. § 28-319, which provides in relevant part:

> Any person who subjects another person to sexual penetration and . . . overcomes the victim by

> force, threat of force, express or implied, coercion, or deception . . . is guilty of sexual assault in the first degree.

Neb. Rev. Stat. § 28-320, which provides in relevant part:

> (1) Any person who subjects another person to sexual contact and . . . overcomes the victim by force, threat of force, express or implied, coercion, or deception . . . is guilty of sexual assault in either the second degree or third degree.
>
> (2) Sexual assault shall be in the second degree . . . if the actor shall have caused serious personal injury to the victim.
>
> (3) Sexual assault shall be in the third degree . . . if the actor shall not have caused serious personal injury to the victim.

Neb. Rev. Stat. § 28-201, which provides in relevant part:

> (1) A person shall be guilty of an attempt to commit a crime if he or she: (a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he or she believes them to be; or (b) Intentionally engages in conduct which, under the circumstances as he or she believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his or her commission of the crime.
>
> (2) When causing a particular result is an element of the crime, a person shall be guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified

> in the definition of the crime, he or she intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.

Neb. Rev. Stat. § 29-2027, which provides in relevant part:

> In all trials for murder the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict whether it be murder in the first or second degree, or manslaughter; and if such person be convicted by confession in open court, the court shall proceed by examination of witnesses in open court, to determine the degree of the crime, and shall pronounce sentence accordingly.

STATEMENT OF THE CASE

This case is before the Court on a writ of certiorari sought by the Warden Frank X. Hopkins on behalf of the State of Nebraska, to review the decision of a unanimous panel of the United States Court of Appeals for the Eighth Circuit (Beam, Bowman, and Bright, Circuit Judges) granting a writ of habeas corpus[1] with respect to the death sentences imposed on respondent Randolph K. Reeves. The Court of Appeals held that respondent's death sentences were imposed in violation of *Beck v. Alabama*, 447 U.S. 625 (1980) because his trial jury was

[1] The Court of Appeals' decision so characterized its disposition of the case because it reversed an order of the District Court which granted the writ on other grounds but denied the writ on the ground the panel found meritorious. See JA 45-46.

given no alternative but to convict him of capital murder or acquit, although there was evidence from which it could have found him guilty of lesser degrees of homicide defined by Nebraska law. JA 64.

A. The Homicides.

Petitioner's Brief takes its description of the homicides of Janet Mesner and Victoria Lamm from the Nebraska Supreme Court's opinion on respondent's direct appeal (Pet. Br. 3-5) – but it cuts off that opinion at the point it begins to discuss the evidence most relevant to the issue presented here. Although it summarized the evidence in the light most favorable to the prosecution and did not separately consider the factual basis for lesser offense instructions,[2] the Nebraska Supreme Court went on from the point petitioner ends its quotation to note the following:

> The evidence at trial established that the defendant was adopted as a child by Donald and Barbara Reeves, who farmed near Central City, Nebraska. The Reeves family was related to the Mesner family. In addition to the interfamily relationship, several members of both families

---

[2] Petitioner acknowledges this. Pet. Br. 19. However, petitioner does not mention an additional reason the Nebraska Supreme Court's version of the facts is an inadequate starting point for analysis of the issue presented here: because it ignored respondent's counsel's citations to *Beck*, the Nebraska Supreme Court did not consider the possibility that limitation of the jury's options may have "introduce[d] a level of uncertainty and unreliability into the factfinding process." *Beck v. Alabama*, 447 U.S. at 643.

practiced the Quaker religious faith. The defendant and Janet were friends, and he had visited her house on prior occasions.

In the events leading up to the killings, the defendant and some of his friends were working a temporary construction job near Hastings, Nebraska. Inclement weather forced cancellation of the work scheduled for March 28, 1980, so the defendant and his coworkers, Ronald Barzydlow and Ray Schmidt, went to a bar in Hastings and began drinking at about 9 a.m. Defendant and his friends arrived at Ray Schmidt's house in Lincoln, Nebraska, at approximately 6 p.m. While at Schmidt's house, the defendant consumed more beer and informed Barzydlow and Schmidt about a party at the home of another of the defendant's friends in Lincoln. Schmidt decided not to attend, but told the defendant that he could stay at his house after the party.

At the party the defendant consumed more alcohol and ingested two or three buttons of peyote, a hallucinatory drug. Mescaline is the main active ingredient of this drug. Several witnesses at the party noted that the defendant was having trouble concentrating and that he told a false story about beating up a friend of his. Mrs. Susan Blackwell, who was also present at the party, noticed that the defendant's eyes were red and glassy; at one point he pinched her and nudged her with his foot.

The defendant and Barzydlow were the last to leave the party at approximately 1:30 a.m. Barzydlow, who had consumed alcohol with the defendant on previous occasions, testified that the defendant was "drunker than I'd ever seen

him. . . . He appeared to me to be in a stupor." On the ride home the defendant told Barzydlow that he wanted to visit a girl. After driving for a short time the defendant was unable to direct Barzydlow to his destination, so he requested to be let out of the car near 40th and Calvert Streets in Lincoln. Barzydlow complied with the request.

Based on the description Janet Mesner gave to the Lincoln police, Officer Bruce M. Bell arrested the defendant at 4:45 a.m. as he attempted to cross O Street between 39th and 40th Streets. The *Miranda* warnings were read, and the defendant answered in the affirmative to all of the questions.

At the time of his arrest the defendant's eyes were red, and he had blood on his hands and outer clothing. In addition, the fly of his trousers was open and his penis was exposed.[3] Later tests determined the blood on defendant's body, including his penis and his clothes, was of the same type as Janet Mesner's blood.

The defendant was taken to the Lincoln police station and placed in an interview room. After again being informed of his *Miranda* rights, the defendant was interviewed on three separate occasions. The third interview, which Assistant Chief of Police Roger LaPage and Lancaster County Attorney Ron Lahners conducted, was the most detailed. The defendant related

---

[3] There was contradictory evidence on this point from one of the police officers on the scene of the arrest, who testified that respondent's fly was opened when he was frisked. Tr. Test. 406. (The trial testimony is reported in several volumes of the Bill of Exceptions, which were exhibits in the District Court below.)

the events that occurred before the murders. He also said that although he could not remember much about the murders, he could remember having stabbed and raped Janet Mesner.[4]

Following the third interview, the defendant was administered a breath-alcohol test at 6:39 a.m. The results showed a blood alcohol content of .149 percent at that time.

At 10:30 a.m. the defendant was taken to Lincoln General Hospital in order to obtain urine, blood, saliva, and penile samples. The defendant's urine and blood samples tested by state chemists confirmed the presence of mescaline. A forensic serologist was unable to find the presence of semen from either the penile swabs of the defendant or the vaginal swabs of either of the two deceased women. However, the acid phosphate [sic] level of Janet Mesner's vaginal sample was consistent with intercourse having occurred.[5]

State v. Reeves, 216 Neb. 206, 210-213, 344 N.W.2d 433, *cert. denied*, 469 U.S. 1028 (1984).

---

[4] There was contradictory testimony about this from the police and from respondent, who testified he had no recall of the events surrounding the homicide but accepted what the police told him he had done. See notes 9-11, below.

[5] The acid phosphatase results were not conclusive, and were roughly the same for both Ms. Mesner and Ms. Lamm. Tr. Test. 980. All other physical and chemical tests were negative for signs of intercourse, forced or otherwise. See page 10, below.

B. The Charges.

In Nebraska, criminal charges are brought by information filed by the county attorney. In this case, the information originally filed charged respondent with two counts of first degree murder, one involving Ms. Mesner and one involving Ms. Lamm. Each count alleged that the homicide was first degree murder because the victim was killed in the course of a first degree sexual assault; but neither specified on whom that assault was committed.

Prior to trial, both counts of the information were amended in two respects: an allegation of intent was added, and it was specified that the alleged sexual assault was on Ms. Mesner. The case went to trial on that amended information, which read essentially as follows:

I.

. . . That Randolph K. Reeves on or about the 29th day of March, AD, 1980, in the County of Lancaster, and the State aforesaid, then and there being, contrary to the form of the statute in such cases made and provided killed Janet Mesner in the perpetration of or attempt to perpetrate a sexual assault in the first degree against Janet L. Mesner, to-wit: he intentionally overcame Janet L. Mesner by force and subjected her to sexual penetration or intentionally engaged in conduct to-wit: he overcame Janet Mesner by force which, under the circumstances as he believed them to be, constituted a substantial step in a course of conduct intended by Randolph K. Reeves to culminate in the crime of overcoming Janet L. Mesner by force and subjecting her to sexual penetration.

II.

And that Randolph K. Reeves on or about the 29th day of March, AD, 1980, in the County of Lancaster, and the State aforesaid, then and there being, contrary to the form of the statutes in such cases made and provided killed Victoria L. Lamm in the perpetration of or attempt to perpetrate a first degree sexual assault in the first degree against Janet L. Mesner, to-wit: he intentionally overcame Janet Mesner by force and subjected her to sexual penetration or he intentionally engaged in conduct to-wit: he overcame Janet Mesner by force, under the circumstances as he believed them to be, constituted a substantial step in a course of conduct intended by Randolph K. Reeves to culminate in the crime of overcoming Janet L. Mesner by force and subjecting her to sexual penetration.

See JA 12-13.

C. The Evidence at Trial.

There was no dispute at trial that the homicides were committed by respondent – his counsel admitted that to the jury in opening statement. The focus of the trial evidence was on the circumstances of the crime and the defendant's intentions and mental capacity at the time he committed it.

i. The evidence of sexual penetration.

First degree sexual assault in Nebraska requires forcible sexual penetration. See Neb. Rev. Stat. § 28-319.[6] The State's pathologist testified he found no trauma to the vaginal or sexual organs of either of the victims and no evidence of spermatozoa on any of the smears taken from their bodies. Tr. Test. 305-306. He testified nothing in his examination indicated that sexual intercourse, forcible or otherwise, had taken place. *Id.* at 307. The State's forensic serologist testified there was no evidence of semen on the vaginal swabs taken from the two victims or from the penile swabs taken from respondent. *Id.* at 979-980. Combings of the pubic hairs of both victims revealed nothing. *Id.* at 975.

Despite the lack of physical evidence, there was police testimony that, before she died, Janet Mesner had said she was "raped." *Id.* at. 340, 655. However, there were substantial contradictions concerning this, between the police officers themselves,[7] and between their testimony and that of the emergency and medical personnel

---

[6] Nebraska law recognizes two lesser degrees of sexual assault which do not contain elements of penetration. See Neb. Rev. Stat. § 28-320. These lesser degrees of sexual assault are not among the enumerated felonies which make a homicide first degree murder. See Neb. Rev. Stat. § 28-303.

[7] One of the officers who reported this statement, Richard Lutz, said he was the only officer present when it was made; however, Det. Don Wilkins said that he was present and heard the words from Ms. Mesner, as well. Tr. Test. 349, 655. In prior testimony, Det. Wilkins had quoted Ms. Mesner as saying that respondent had "attempted" to rape her. *Id.* at 657.

who were with Ms. Mesner treating her from the time she was found until she died.[8]

There was also police testimony attributing admissions to respondent "that he had stabbed and raped Janet." Tr. Test. 602. However, there were contradictions in that testimony as well.[9] Respondent testified at trial and admitted using the word "rape;" but he said that he did so because that is what he was told by police he had done, while in fact he had no recall of the homicides at

---

[8] In Janet Mesner's 911 call (which was recorded), she reported she had been stabbed but said nothing about being raped. Tr. Test. 165-166. Nor did she say anything about rape or sexual assault to the first Lincoln Police Officer to arrive at the crime scene, who questioned her. *Id.* at 207-208. Nor was she heard to say any such thing by the Emergency Medical Technician who was the first to contact her at the crime scene and stayed with her until she arrived at the hospital – although the EMT said Ms. Mesner was alert and communicative and he heard her identify Randy Reeves as her assailant. *Id.* at 214-223. Moreover, although he recently had completed a course in emergency care of sexual assault victims, the EMT said that, based on what he saw, he did not suspect Ms. Mesner had been raped. *Id.* at 225.

At the hospital, Ms. Mesner remained alert and communicative and spoke to two emergency room physicians, both of whom testified they heard her say nothing about being sexually assaulted. *Id.* at 131-32, 322.

[9] For example, Officer Bruce Bell testified at the preliminary hearing that in the first interrogation session (which was not recorded) respondent did not answer when asked whether he had tried to have sex with either of the two women. Prelim. Hrg. Tr. 26. Before the jury, Officer Bell testified respondent stated he recalled attempting to have sex with Ms. Mesner and then getting extremely mad. Tr. Test. 505, 527-528, 552-554, 558-560.

any time[10] Transcripts of respondent's statements show police suggesting to him that he had "raped and stabbed Janet," and respondent answering that he "vaguely" recalled that.[11]

---

[10] Tr. Test. 1402-03, 1412, 1473. Respondent testified he assumed that what the police told him was true because he saw the blood on his skin and clothing. *Id.* at 1503. Respondent's principal interrogator, Det. Wilkins, denied telling him this, and claimed that from the outset respondent had said "he remembered only that he had stabbed and raped Janet." *Id.* at 602. Det. Wilkins specifically denied knowing the victim's name or details of the crime before speaking with respondent; contradictorily, however, he was one of the officers who claimed to have heard Ms. Mesner say she was "raped and stabbed" before she died. *Id.* at 711-12, 1707.

[11] This first mention of "rape" in the first recorded interview, which followed more than two hours of unrecorded questioning, occurs in the following exchange:

> Q. Do you recall what you did on March 28, 1980?
>
> A. Vaguely.
>
> Q. Can you tell me what you recalled [sic]?
>
> A. We started drinking at about 9 o'clock that morning. Me and Ron Barzydlo [sic], and Ray Schmidt. And we drank continuously and went over to a friends house, but I can't recall where it was at, where we drank for about 15 to 16 hours straight. And I'll admit to raping or stabbing someone, but I'm really hazy on the facts, I'm not sure.

Tr. Exh. 24 at 2. After that, the transcript shows respondent being repeatedly asked "about raping and stabbing" Ms. Mesner, which he says he recalls "Very vaguely, very, very vaguely" (*id.* at 4) but can never describe.

ii. The evidence of attempted sexual penetration.

The amended information charged in the alternative that the victims were killed in an "attempt to perpetrate a sexual assault in the first degree against Janet L. Mesner. . . . " See JA 12. The allegation of attempt required proof of a specific intent: as described in the jury instructions, "intentionally engaging in conduct . . . which . . . constituted a substantial step in a course of conduct intended . . . by Randolph K. Reeves to culminate in the crime of overcoming Janet L. Mesner by force and subjecting her to sexual penetration." JA 14. Proof of this subjective intent was necessarily circumstantial.[12] As the Court of Appeals observed in its summary of the evidence, the circumstantial evidence suggested that the homicide of Ms. Mesner was connected to some kind of a sexual assault (JA 43), although the nature of that assault was unclear.

Respondent's underpants were found in the bedroom where the assault apparently took place. Tr. Test. 952-53.

---

[12] The jury was so instructed:

> Intent is a mental process, and it therefore generally remains hidden within the mind where it is conceived. It is rarely if ever susceptible to proof by direct evidence. It may, however, be inferred from the words and acts of the defendant and circumstances surrounding his conduct. But before that intent can be inferred from such circumstantial evidence alone, it must be of such character as to exclude every reasonable conclusion except that the defendant had the required intent.

JA 19.

The inside of the underwear was stained with Mr. Reeves' semen (*id*. at 955-56), although no semen was found in swabs taken from his penis (*id*. at 978). Ms. Mesner was wearing a robe, but was otherwise unclothed when emergency personnel reached her. *Id*. at 182. Her nightgown, which had cuts in it, was found in her bedroom. *Id*. at 805. Ms. Mesner told emergency personnel she was standing up when she was stabbed. *Id*. at 346.

Respondent earlier had made advances to another woman at the friend's house where he was given the peyote buttons (Tr. Test. 1128); but they also described him becoming angry and agitated talking about the white men committing genocide and killing buffalo. *Id*. at 1059.[13] Police officers quoted him as saying that he had "attempted to have sex with Janet" and had gone to the house "to have sex with Janet". *Id*. at 527, 603. It was unclear when or whether any such attempt happened in the hour and a half respondent was in the house with Ms. Mesner and Ms. Lamm before the stabbings occurred. A defense psychiatrist opined that respondent had exploded at some real or imagined provocation. Tr. Test. 1303. Defense counsel pointed out that, if respondent's motive had been sex, it made no sense for him to obtain it by stabbing his victim to death. *Id*. at 2170.

In sum, although there was circumstantial evidence suggesting that some kind of sexual activity occurred or was attempted, it was far from conclusive on any score.

---

[13] Respondent is Native American. Tr. Test. 1610.

iii. The evidence of intoxication.

Consistent with Nebraska law, respondent's jury was told that it could consider his drug and alcohol intoxication with respect to whether he was "capable of having the intent charged in regard to the alleged perpetration of or attempt to perpetrate a sexual assault in the first degree." JA 23. The intoxication evidence was overwhelming. Breath alcohol tests taken during his interrogation showed high blood alcohol levels persisting even hours after the offense. Expert witnesses at trial extrapolated from these results that respondent's blood alcohol levels at the time of the offense were between .19 and .23, roughly twice the legal limit for intoxication defined in the motor vehicle laws. See Tr. Test. 1557, 1966. Blood tests taken after respondent's arrest also showed there was mescaline in his system, the result of his ingesting peyote buttons along with alcohol at a friend's house the night before. *Id*. at 1152. Expert testimony indicated that mescaline is a hallucinogen which acts synergistically with alcohol. *Id*. at 1535-36.

Witnesses who saw respondent in the hours before the homicide described him as "extremely intoxicated" (*id*. at 1126), "in a stupor" (*id*. at 1062), "in a daze" (*id*. at 1062), "incoherent" (*id*. at 1104).

Three defense experts testified at trial that respondent's level of intoxication was such that it rendered him incapable of forming the intent to commit a sexual assault or rape. *Id*. at 1325, 1424, 1552. The prosecution's experts focused on the insanity issue and had little or nothing to say on this issue.

D. The Jury Instructions and Verdict.

At the outset of the case, the defense submitted instructions which, consistent with Neb. Rev. Stat. 29-2027, permitted the jury to consider all degrees of homicide. See JA 26-32. In an instruction conference held just before the case went to the jury, the trial court announced that it was rejecting that defense request and instructing on first degree murder, only.

> The Court is rejecting the proposed Instruction Number 1 and Number 2 of the defendant to instruct the jury in regard to degrees of murder and manslaughter. The Court, in doing so, is taking into consideration the following cases: State v. Harris, State v. McDonald – Harris is 194 Neb. 74; State v. McDonald, 195 Neb. 625; State v. Casper, 192 Neb. 120; Garcia v. State, 159 Neb. 571; State v. MacAvoy [sic], 144 Neb. 827. And none of those cases, they all being – and the Court has read State v. Montgomery, 191 Neb. 470. In all of those cases except the Montgomery case, the Court held that those were all cases that – homicides during the commission of the felony, and instructions were not given in some of those cases. It was ruled on specifically by the Supreme Court. In Montgomery v. State, there is some dicta to the effect that if the facts and circumstances permit that, and the evidence permits it, that it might be appropriate to give an instruction under certain conditions. And the Court finds that those conditions do not exist in this case.

JA 3. After so ruling, the trial court allowed defense counsel to state the "reasons" for his lesser included offense request. JA 4. Counsel did so, arguing among

other things that the evidence could support an "inference" of circumstances similar to those alluded to in the *Montgomery* case,[14] that the allegation of intent differentiated this case from other Nebraska felony murder cases, that lesser included offense instructions would be warranted under general principles of Nebraska law, and that "the failure to give lesser included offenses, in the words of the case of *Beck v. Alabama*. . . . would enhance the risk of an unwarranted conviction." JA 6-8. The prosecutor gave no response to these arguments, saying "we've been over it pretty well previously." JA 9. The trial court then restated the basis for its ruling as follows:

> In regard to the Supreme Court of this state it has held consistently as far as this Court is aware that when lesser included offenses are given they must contain some, if not all, of the elements or some of the elements charged in the principle offense. For instance, in murder in the first degree there is premeditation, deliberation and malice as well as intent. Second decree [sic] murder in this state only contains intent. Therefore, on a premeditated murder, a second offense instruction, a manslaughter offense instruction is proper. Because manslaughter doesn't require any intent. However, in a felony murder case, which this Court considers this is, no intent is required in the killing where the act

---

[14] Counsel argued "the Court is depriving defendant of the inference that he intentionally assaulted and stabbed either or both victims prior to any intent to sexually assault any person." JA 8. The *dicta* in *State v. Montgomery*, 191 Neb. 470, 215 N.W.2d 881 (1974) alluded to by the trial judge described a hypothetical case in which "robbery indeed was an afterthought and not the direct means of perpetrating the felony." 215 N.W.2d at 884.

charged is murder while in the perpetration of a specified felony. In this case, sexual assault in the first degree or attempted sexual assault in the first degree. There is no intent required for killing.

If you go to the first degree murder by premeditation, deliberation, and second degree murder, then you are going – you are putting in the element of intent on the killing and no intent is required here. Therefore, there is no intent required.

The Court refers to the case of State v. MacAvoy as one of those cases where intent is not required in a murder and the perpetration of a felony. And some of the other cases the Court has researched, all of the cases that have been to the Supreme Court, felony murder, in some of those cases the court, where the issues [sic] is rai[s]ed has specifically held that the Court was proper in not granting the request to instruct on second degree murder and manslaughter. The objections are overruled. . . .

JA 9-10. Accordingly, the jury was instructed that its only options were to convict respondent of first degree murder or to find him not guilty. JA 13.[15]

---

[15] The jury was given options to find the defendant either "not guilty or not guilty by reason of insanity or mental derangement." JA 13. The latter defense was governed by Nebraska's then-prevalent modification of the *M'Naughten* rule. See JA 22. In closing argument, the prosecutor falsely implied to the jury that either form of "acquittal would mean that Reeves would 'walk out of this courtroom a free man.' " JA 60 n.12. The Court of Appeals found this misstatement "heightened the 'death or acquit' dilemma." *Ibid.*

The court's instructions told the jury that, apart from the sanity question, it had to "determine from all the facts and circumstances in evidence whether or not the defendant committed the acts complained of and whether at that time he had the criminal intent required by [the instructions.]" JA 19. The jury was further told that the intent which was an element of both sexual assault in the first degree and attempted sexual assault in the first degree was a subjective mental process, but could "be inferred from the words and acts of the defendant and the circumstances surrounding his conduct." JA 19. Among those circumstances, the jury was told it could consider "voluntary drug intoxication or voluntary alcohol intoxication with respect to the defendant's capacity to have the intent charged in regard to the alleged perpetration of or attempt to perpetrate a sexual assault in the first degree." JA 23. The jury also was told "to determine from the facts and circumstances in evidence" whether "the initial crime of perpetration of or attempt to perpetrate a sexual assault in the first degree and homicide were closely connected in point of time, place and causal relation, and were parts of one continuous transaction." JA 21.

Finally, the jury was told – as it was at the beginning of trial – that it had "no right to take into consideration what punishment or disposition [the defendant] . . . may or may not receive in the event of his conviction or in the event of his acquittal by reason of insanity." JA 24; see also JA 2.

The jury found respondent guilty of first degree murder as charged, on both counts. Pursuant to Neb. Rev. Stat. § 29-2520, the trial judge requested the assignment

of two other judges to a three judge sentencing panel. After a separate sentencing proceeding, the panel imposed sentences of death on both counts.

E. The Direct Appeal.

On appeal, respondent's attorneys again argued that a lesser offense instruction should have been given, explaining their position under the facts of the case and Nebraska law and "invit[ing] the Court's consideration of the recent decision in *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), where the United States Supreme Court held that it was a denial of due process of law in a death case to refuse to submit a lesser included offense." BRIEF OF APPELLANT at 91, *State v. Reeves*, Neb. Sup. Ct. No. 81-706. Their Brief went on to quote from *Beck* for almost a full page;[16] but the Nebraska Supreme Court ignored it.

The Nebraska Supreme Court's opinion neither mentioned *Beck* nor considered whether the facts of respondent's case warranted a lesser offense instruction. Instead, it rejected the argument under its own caselaw establishing a per se rule against such instructions in felony murder cases. This is its full discussion of the issue:

> The defendant contends that the trial court erred in refusing to submit jury instructions on lesser-included offenses of second degree murder and manslaughter.

---

[16] *Id* at 91-92. *Beck* was cited on three other pages of this Brief as well. See *id*. at ii.

> The critical difference between a felony murder charge and a regular first degree murder charge with respect to intent has been addressed by this court on a number of previous occasions. The turpitude involved in the sexual assault takes the place of intent to kill or premeditated malice, and the purpose to kill is conclusively presumed from the criminal intention required for sexual assault. *State v. Hubbard*, 211 Neb. 531, 319 N.W.2d 116 (1982); *State v. Bradley*, 210 Neb. 882, 317 N.W.2d 99 (1982); *State v. Montgomery*, 191 Neb. 470, 215 N.W.2d 881 (1974).
>
> In *State v. Hubbard, supra* at 534, 319 N.W.2d at 118, we stated that "[w]here an information charges a defendant with a killing committed in the perpetration of or attempt to perpetrate one of the specific felonies set out in § 28-303(2), second degree murder and manslaughter are not lesser-included offenses, and it is ordinarily error for the trial court to instruct the jury that it may find the defendant guilty of second degree murder or manslaughter, even though such an instruction is requested." In light of the holdings in the above-cited cases, defendant's contention is without merit.

State v. Reeves, 216 Neb. at 217.

F. The Postconviction Proceedings.

Respondent then sought relief from his conviction and death sentence in postconviction proceedings. In arguments in that petition before the Nebraska Supreme Court, he once again raised the claim that his death sentence violated *Beck v. Alabama*. The Nebraska Supreme

Court rejected his petition without mentioning the *Beck* issue. *State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359 (Neb. 1990). This Court granted review of that decision and vacated the case and remanded for further consideration in light of *Clemons v. Mississippi*, 494 U.S. 738 (1990). On remand, the Nebraska Supreme Court purported to "reweigh" the aggravating and mitigating circumstances in respondent's case, but reaffirmed his sentence of death. *State v. Reeves*, 239 Neb. 419, 476 N.W.2d 829 (1991), *cert. denied*, 506 U.S. 837 (1992).

G. The Proceedings Below.

The United States District Court for the District of Nebraska considered but rejected respondent's *Beck* argument, saying

> Both *Beck* and *Hopper v. Evans*, 456 U.S. 605 (1982) were premised on state courts' findings that the claimed lesser-included offenses were in fact lesser-included offenses under applicable state law. This distinction makes them inapplicable to petitioner's case.

Reeves v. Hopkins, 871 F. Supp. 1182 (D. Neb. 1994) (footnote omitted). However, that court granted respondent habeas relief from his death sentence on a different ground. *Id.* at 1240.

The Court of Appeals reversed the grant of the writ and remanded for consideration of the remaining constitutional issues, reserving judgment on respondent's *Beck* claim. *Reeves v. Hopkins*, 76 F.3d 1424 (8th Cir.1996). On remand, the District Court again held the writ should

issue on yet another constitutional ground. *Reeves v. Hopkins*, 928 F.Supp. 941, 965-66 (D.Neb.1996). The State appealed again, and the Court of Appeals again reversed but held that relief should be granted on respondent's *Beck* claim. JA 45-46.

The Court of Appeals' decision began by describing *Beck*'s rationale and concern with " 'the distortion of the fact finding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence,' " as respondent's jury was. JA 53, quoting *Spaziano v. Florida*, 468 U.S. 447, 455 (1984). It then proceeded to address the various grounds on which the State argued *Beck* is inapplicable to this case. It first rejected the State's argument that the state courts' decision was conclusive, saying that "position would say in effect that *Beck* means only that a criminal defendant is entitled to instructions on lesser included offenses to which state law says he or she is entitled. But if this were true, then *Beck* itself would have been decided differently." JA 54. The decision then said the State's argument "that the difference between the mental states required for felony murder and premeditated first degree murder is the basis for the prohibition on lesser included offense instructions in felony murder cases" was both "inconsistent with *Beck*, and . . . would put *Beck* at odds with *Enmund*." JA 58. It then noted that "the 'death or acquit' dilemma may have been exacerbated in Reeves's case" because "the prosecutor erroneously told the jury in summation that an acquittal would mean that Reeves would 'walk out of this courtroom a free man.' " JA 60 n.12. Finally, it rejected the State's argument that *Beck* was distinguishable because it "involved a statute that automatically imposed the death

sentence, whereas Reeves's jury had no involvement in sentencing," saying: "This case is like *Beck*: the jury had no ultimate control over the imposition of a death sentence and could only choose to convict Reeves of a death-eligible crime or to acquit him." JA 60 n.13.

SUMMARY OF ARGUMENT

The Court of Appeals correctly concluded that this case is directly controlled by the constitutional rule of *Beck v. Alabama*, 447 U.S. 625 (1980). Respondent's counsel so argued to the Nebraska state courts at trial and on appeal, but those courts ignored his arguments and failed even to mention *Beck*. Had they considered *Beck*, the Nebraska courts could not reasonably have sustained respondent's death sentences.

1. As the Court of Appeals held, the evidence at respondent's trial would have supported a verdict of either of two lesser offenses defined by Nebraska law: second degree murder and manslaughter. The lack of any physical evidence of sexual penetration clearly gave rise to a reasonable doubt that a first degree sexual assault actually occurred. Because of ambiguities in the circumstantial evidence and his extreme level of intoxication, a rational juror could also have doubted whether, at the time of the killings, respondent had the specific intent to commit a first degree sexual assault that Nebraska law and the jury instructions required. Such a juror could have been convinced, nonetheless, that respondent was not wholly unable to understand what he was doing, and

was thus legally sane. That juror might well have concluded from the circumstantial evidence that the killings were intentional and therefore second degree murders, or that they resulted from a "sudden quarrel" or an unlawful act (such as a lesser degree of sexual assault), and thus constituted manslaughter. But under the instructions given here, that juror would have had no way to give effect to that conclusion other than finding respondent not guilty of any crime.

Petitioner's new, barely asserted arguments that the Court of Appeals was wrong, and the trial evidence would not support lesser offense verdicts, are not supported by the record. Such lesser verdicts would have been fully consistent with respondent's defense, and the state courts did not rule to the contrary.

2. The Court of Appeals also correctly held that the Nebraska courts' refusal to allow the jury to consider lesser degrees of homicide could not answer the federal constitutional question that refusal, itself, raised. As the Court of Appeals noted, to hold otherwise would contravene *Beck*'s core holding, which requires an examination of the state courts' reasons for refusing to permit the jury to consider a "third option" to acquittal and conviction of a capital offense. This did not "rewrite" Nebraska law; like *Beck*, it simply invalidated an aberrant exception to the state's own generally applicable law of homicide and lesser offenses.

a. Nebraska caselaw has long described homicide as a single offense divided into several degrees. Moreover, for well over a hundred years, Nebraska's

statutes have included a provision which states unequivocally that "in all trials for murder the jury . . . shall ascertain in their verdict whether it be murder in the first or second degree, or manslaughter. . . . " Neb. Rev. Stat. § 29-2027. Consistent with this statute, Nebraska has always followed a "lesser related offense" rule in all homicide prosecutions except felony murders. The Nebraska Supreme Court has never addressed the question of whether that statute applies to felony murder prosecutions, or if it does not, why it does not.

b. Similarly, although Nebraska's general law of lesser included offenses has changed repeatedly, at many times Nebraska has employed a "cognate evidence approach" which looks not only to the elements of the crime but also to the evidence adduced at trial. Nebraska's prohibition of lesser offense instructions in felony murder cases is inexplicable under that approach which, according to one Nebraska Supreme Court opinion, was the law when respondent was tried. Moreover, even under the strictest of the lesser offense rules Nebraska has followed – which requires that "the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time committing the lesser" – felony murder would include involuntary manslaughter, which in Nebraska involves causing death in the commission of an unlawful act. Yet (as the Solicitor General notes) the Nebraska courts never have considered that, either.

c. In light of this, it is difficult to understand Nebraska's refusal to allow any lesser offense instructions in a case like this one, where there is evidence

casting doubt on the predicate felony of the felony murder charge and supporting two different lesser homicide offenses. The answer may lie in the misguided conversion of an unexceptionable statement of legislative policy – that in felony murders "the turpitude involved in the [felony] . . . takes the place of intent to kill or premeditated malice" – into a "conclusive presumption" of "purpose to kill . . . from the criminal intention required for [the felony]." But even that explanation is hard to fit to the facts here, where the defense was that the defendant did not have, and could not have had, "the criminal intention required for the felony."

d. Whatever the explanation for it, Nebraska's refusal to allow respondent's jury to consider any conviction less than first degree murder, a capital offense, when there was evidence to support verdicts of two lesser degrees of homicide, cannot be squared with *Beck*.

3. The Court of Appeals correctly found that the differences between Nebraska's and Alabama's sentencing schemes do not exempt Nebraska from *Beck*'s rule. To the contrary, because *Beck*'s principal concern was with unreliable capital convictions, rather than unreliable acquittals, Nebraska's scheme – in which juries have no sentencing role, and are told not to consider the consequences of a guilty verdict – presents more of a danger than Alabama's, or any other capital punishment system.

4. Because the Court of Appeals' decision was dictated *a fortiori* by *Beck v. Alabama* and *Spaziano v. Florida*, 468 U.S. 447, 456 (1984), both of which were decided before respondent's conviction became final, this case

presents no retroactivity problem under *Teague v. Lane*, 489 U.S. 288 (1989).

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE FACTS OF THIS CASE SUPPORTED INSTRUCTIONS ON SECOND DEGREE MURDER AND MANSLAUGHTER, AS THOSE CRIMES ARE DEFINED IN NEBRASKA.

The major premise of the Court of Appeals' decision below was that "[t]he facts would have supported a conviction for either second degree murder or manslaughter" as those crimes are defined by Nebraska law. JA 60. That was effectively conceded below,[17] and no court has held to the contrary. Certainly, the Nebraska Supreme Court did not; its rejection of respondent's lesser included offense argument was made purely as a matter of law. See pages 20-21, above.

Despite this, petitioner claims for the first time here that "the *record* would not have supported the giving of a lesser included offense instruction even if lesser included offenses had existed under Nebraska law," because respondent's trial defense, if believed, would have "prevented his being found guilty of *any* criminal offense."

[17] Respondent's counsel believes this was explicitly conceded in argument in the Court of Appeals; but there is no official record of that argument which can confirm this. In any event, petitioner did not argue to the contrary in its briefs below, and did not seek rehearing on this point. See Appellant's Petition for Rehearing, *Reeves v. Hopkins*, 8th Cir. No. 95-1098.

Pet. Br. 20 (original emphasis).[18] Examination of the only citation petitioner offers in support of this novel claim disproves it:

> The defendant at trial maintained that he was not guilty of the felony murder counts because of his inability to form the requisite intent needed for a first degree sexual assault or a first degree attempted sexual assault. *Alternatively*, in the event the jury found that he could entertain the intent to commit the sexual assault or attempted sexual assault, he pled not guilty by reason of insanity.

State v. Reeves, 216 Neb. at 212 (emphasis added). In fact, respondent's trial defense raised questions even beyond those included in that summary statement; but it suffices to show that it is simply false to claim that "Reeves *sole* defense" was insanity. Pet. Br. 20 (original emphasis).

In Nebraska as elsewhere, the "diminished capacity" defense does not require a showing that would prevent a defendant from being found guilty of "*any* criminal offense." *Ibid*. Respondent's jury was told that there was a difference between those degrees of mental incapacity. See JA 22, 23. However, the jury's only way to express a

[18] A page earlier, respondent attempts to bolster this argument by claiming that the "trial court rejected Reeves' request for lesser included offense instructions" on factual as well as legal grounds. Pet. Br. 19. Even assuming that the trial court comments to which petitioner alludes were intended as such a ruling – which is far from clear, see JA 3 – after defense counsel stated his position (which included a contrary view of the facts) the trial court placed its final decision on purely legal grounds. JA 9-10. More importantly, as petitioner admits, so did the Nebraska Supreme Court. Pet. Br. 19.

conclusion that respondent had the *lesser* form of incapacity was to acquit him outright.

Respondent's counsel's ultimate presentation of the case to the jury was undoubtedly altered by the trial court's refusal to instruct on this half of the defense theory of the case. See *Hopper v. Evans*, 456 U.S. at 613 n.* Still, as the Nebraska Supreme Court acknowledged and as the Court of Appeals below held, there was no inconsistency between the defense position and its requests for these lesser offense instructions. Clearly, that was not the reason for the rejection of that request.

II. THE COURT OF APPEALS CORRECTLY HELD THAT THE NEBRASKA COURTS' REFUSAL TO GIVE LESSER OFFENSE INSTRUCTIONS CANNOT BE CONCLUSIVE OF RESPONDENT'S FEDERAL CONSTITUTIONAL CLAIM.

Petitioner's primary argument here, as in the court below, is that the Nebraska Supreme Court's decision was controlling on the federal constitutional issue (Pet. Br. 14-19) even though the Nebraska Supreme Court never considered or addressed it. The Court of Appeals sensibly rejected this argument as contrary to *Beck* itself: "State law can[not] foreclose *Beck* claims by declaring that felony murder has no lesser included offenses; this is exactly what the Alabama legislature had done in *Beck*, after all." JA 57.

Petitioner tries to avoid this plain truth with hyperbole, reformulating Nebraska's judge-made rule against lesser offense instructions in felony murder cases as a "state substantive law" (Pet. Br. 15) that "no lesser

included offenses exist" (Pet. Br. 18), which a federal court can override only by "creat[ing] a class of lesser but not included offenses" and "rewrit[ing]" state law (Pet. Br. 19). An examination of Nebraska laws shows to the contrary. Nebraska "substantive law" would have permitted the trial court in respondent's case to instruct on the lesser degrees of homicide as he requested – indeed, it would have required it to do so – but for an idiosyncratic and equivocal exception the Nebraska Supreme Court has applied in felony murder cases. The Court of Appeals did not "rewrite" Nebraska law, but simply did what this Court did in *Beck* – it forbade the state from making an exception to the usual rules which is limited to capital trials and creates an unusual and unjustified level of unreliability.

A. Nebraska's Homicide Statutes Require Instructions on "Lesser Related Offenses"

Although its statutory definition is in two parts, the Nebraska Supreme Court has long held first degree murder is a single "offense" which can be committed two different ways. *State v. Buckman*, 237 Neb. 936, 941-2, 468 N.W.2d 589 (1991); see *State v. Nissen*, 252 Neb. 51, 56, 560 N.W.2d 157 (1997). In fact, it has long been an axiom of Nebraska law that its statutes

> defining murder in the first degree, murder in the second degree and manslaughter, construed with section 29-2027, R.S.1943, define the degrees of the crime of criminal homicide, a single offense. The unlawful killing constitutes the principal fact and the condition of the mind or attendant circumstances determine the

> degree or grade of the offense, and when the greater of the degrees has been committed, the lesser degrees have also been committed, they being necessarily involved as a constituent part of the higher crime. Consequently, a conviction of murder in the second degree, or manslaughter, could legally be sustained, although the evidence made out a case of murder in the first degree.

State v. Hutter, 145 Neb. 798, 804-05, 18 N.W.2d 203 (1945).[19]

The statute "construed with" those defining homicide in this passage, Neb. Rev. Stat. § 29-2027, has been Nebraska law since statehood. It says unequivocally that "[i]n *all* trials for murder the jury . . . *shall* ascertain in [a guilty] . . . verdict whether it be murder in the first or second degree, or manslaughter. . . . " *Ibid.* (Emphasis

[19] See also *State v. Ellis*, 208 Neb. 379, 388-89, 303 N.W.2d 741 (1981) (upholding instructions on second degree murder and manslaughter where victim was apparently abducted and her body was found without clothes or jewelry; "where the evidence and the circumstances of the killing are such that different inferences may properly be drawn therefrom as to the degrees, it becomes the duty of the court to submit the different degrees to the jury for them to draw the inferences [citations omitted]. In view of the fact that in this case there were no eyewitnesses to the death of [the victim] . . . and that the evidence adduced was largely circumstantial, the court was correct in instructing the jury as to the law governing murder in the first degree, second degree and manslaughter."); *State v. Whipple*, 189 Neb. 259, 260-61, 202 N.W.2d 182 (1972); *Moore v. State*, 148 Neb. 747, 750, 29 N.W.2d 366 (1947).

added.)[20] In Nebraska premeditated first- and second-degree murder prosecutions, this statute is followed strictly and literally: lesser degrees of homicide must be considered whether or not they are technically "included" in the degree charged. See, e.g., *State v. Vosler*, 216 Neb. 461, 345 N.W.2d 806 (1984) (requiring instruction on voluntary manslaughter in premeditated first degree murder prosecution); *State v. Rowe*, 210 Neb. 419, 315 N.W.2d 250 (1982) (same). Some of the cases so holding acknowledge that "[m]anslaughter is not a lesser included offense of first degree murder as 'lesser included offense' is defined" in non-homicide cases. *State v. Vosler*, 216 Neb. at 465. But they require instructions on those lesser offenses, regardless of that and regardless even of the defendant's position on the subject:

> Notwithstanding an information charging murder, when evidence can support different and reasonable inferences regarding the degree or grade of criminal homicide, the jury must draw the inference determining the degree of criminal homicide. See, *Moore v. State*, 148 Neb. 747, 29 N.W.2d 366 (1947); *Jackson v. Olson*, 146 Neb. 885, 22 N.W.2d 124 (1946); *Denison v. State*, 117 Neb. 601, 221 N.W. 683 (1928).
>
> In order that there be an instruction on manslaughter as a lesser degree of criminal

[20] This statute was taken directly from the 1794 Pennsylvania Criminal Code, which established the norm in the American law of homicide at the time of Nebraska's admission to the Union and the adoption of the Fourteenth Amendment. See *Schad v. Arizona*, 501 U.S. at 641; *id.* at 648-49 (concurring opinion of Justice Scalia); Edwin R. Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. Pa. L. Rev. 6 (1949).

> homicide within the charge of murder, there must be evidence which tends to show that the crime was manslaughter rather than murder. See *State v. Beers*, 201 Neb. 714, 271 N.W.2d 842 (1978).
>
> When a proper, factual basis is present, a court must instruct a jury on the degrees of criminal homicide, that is, the provisions of § 29-2027 are mandatory. See *Bourne v. State*, 116 Neb. 141, 216 N.W. 173 (1927). Where murder is charged, the court is required, even without request, to instruct the jury on the lesser degrees of criminal homicide for which there is proper evidence before the jury. See *State v. Hardin*, 212 Neb. 774, 326 N.W.2d 38 (1982).

State v. Archbold, 217 Neb. 345, 350, 350 N.W.2d 500 (1984).

Despite this statute's unrestricted reference to "all trials for murder," and despite Nebraska's construction of its first degree murder statute as setting forth a "single crime," this statute has been ignored in felony murder prosecutions. No Nebraska case discusses whether this statutory "lesser related offense" rule applies in felony murder cases, or explains why it does not if it does not.

B. Nebraska's Generally Applicable Common Law Would Require Instructions On Second Degree Murder And Manslaughter.

Nebraska's common law governing lesser offense instructions in criminal trials generally has been in a state of flux for decades.

> Over the last 15 years, this court has utilized two approaches to determine the appropriateness of a lesser-included offense instruction. The cognate-evidence approach looks to the elements of the crime as defined in the statute and the evidence adduced at trial. *State v. Garza*, 236 Neb. 202, 459 N.W.2d 739 (1990). In *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993) *Garza* was overruled as far as the cognate evidence approach was concerned, and this court held that to be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time committing the lesser.

State v. Al-Zubaidy, ___ Neb. ___, ___ N.W.2d ___, 1997 WESTLAW 730637 *3 (November 21, 1997). *State v. Garza*, which as noted was overruled by *State v. Williams*, in turn overruled *State v. Lovelace*, 212 Neb. 356, 322 N.W.2d 673 (1982), which had adopted a test similar to the one *Williams* reinstated.[21] Thus, in criminal cases generally Nebraska has followed at least two different rules regarding lesser offense instructions at times relevant to this

---

[21] A similar, but reversed, sequence of overrulings has occurred in Nebraska cases involving the particular question of lesser included offenses of attempted crimes. The cases that expanded the scope of lesser offense instructions generally contracted them with regard to this class of cases, on the theory that the "cognate evidence" rule would be "unworkable" in that context. *State v. Garza*, 236 Neb. at 208. Thus, *State v. Garza* overruled *State v. Jackson, supra*, which had overruled *State v. Swoopes*, 223 Neb. 914, 395 N.W.2d 500 (1986) on the same issue. See *State v. Garza*, 236 Neb. at 209. Completing the circle, *Garza* has now been overruled on this issue, in turn as well, by *State v. Williams* and the cases following it. See *State v. Al-Zubaidy*, at *4-5.

case: a "cognate evidence" rule that requires instructions on all offenses supported by the evidence, and a strict "lesser included offense" rule that looks exclusively to the statutory elements of the offenses. Under either of these rules, lesser offense instructions would have been required in this case.

1. Under Nebraska's Traditional "Cognate Evidence" Rule, Respondent's Jury Should Have Been Instructed On Both Second Degree Murder and Manslaughter.

In its decision in *State v. Garza, supra*, which was later overruled on other grounds, the Nebraska Supreme Court said that the "cognate evidence rule" governed lesser offense instructions in Nebraska in the years up to and including the time of respondent's trial:

> In the *Lovelace* case we abandoned the rule which had been followed for many years in Nebraska and which is known as the cognate theory and appears to be followed in a majority of jurisdictions. See Blair, *Constitutional Limitations on the Lesser Included Offense Doctrine*, 21 AM.CRIM.L.REV. 445, 449 (1984). That rule is illustrated by our decision in *Alyea v. State*, 62 Neb. 143, 86 N.W. 1066 (1901), in which we relied upon the allegations in the information and the proof offered in support of the allegations in determining that assault and battery was not a lesser-included offense of assault with intent to inflict great bodily injury. . . .
>
> While *Lovelace* changed somewhat the rule set forth in *Alyea*, our decisions since the *Lovelace* case have not followed the *Lovelace* rule. See, e.g., [*State v.*] *Jackson*, [225 Neb. 843, 408 N.W.2d 720 (1987)] . . . and *State v. Hoffman*, 227 Neb. 131, 416 N.W.2d 231 (1987).

State v. Garza, 236 Neb. at 205. Thus, according to *Garza*, until 1982 (and in most cases after) Nebraska followed a "lesser related offense" rule in all criminal cases, similar to that which Nebraska has at all times followed in homicide cases pursuant to Neb. Rev. Stat. § 29-2027. Respondent's counsel took a similar position at trial, relying on two then-recent decisions, *State v. Tamburano*, 201 Neb. 703, 271 N.W.2d 472, 474 (1978), and *State v. Johnsen*, 197 Neb. 216, 247 N.W.2d 638 (1976), which looked primarily to the elements of the charge as spelled out in the Information, rather than the statutes themselves. See JA 7-8, 37-38, 39.

Under either the broad "cognate evidence" rule described in *Garza* or the less expansive version of it applied in *Tamburano*, both second degree murder and manslaughter instructions would have been given in this case. As discussed above, there was evidence from which the jury could find an intentional killing even if it had doubts about whether there was an intent to force sexual penetration; and the Information alleged that the killings were perpetrated by the intentional use of force. See JA 12-13. In Nebraska an intentional killing which is not proved to have been in the perpetration of an enumerated felony is second degree murder. Neb. Rev. Stat. § 28-304. Similarly, there was substantial evidence from which the jury could find that the killings occurred in a "sudden quarrel" or during an unlawful act other than first degree sexual assault – the two forms of manslaughter recognized in Neb. Rev. Stat. § 28-305.

Thus, under the generally applicable law of lesser offense instructions in force through most of Nebraska's history, including at time of respondent's trial, both lesser offense instructions at issue here would have been given.

2. Under Nebraska's Current "Lesser Included Offense" Approach, Respondent's Jury Should Have Been Instructed On Involuntary Manslaughter.

Even the narrowest of all Nebraska's various rules governing lesser offense instructions – the strict "lesser included offense" approach adopted in *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993) – would require an involuntary manslaughter instruction here. Involuntary manslaughter in Nebraska is an unintentional killing in the course of an unlawful act. Neb. Rev. Stat. § 28-305[22] Nebraska has held that an assault with a knife is an "unlawful act" within the meaning of this statute *State v. Archbold*, 217 Neb. at 349. So, certainly, are the crimes of actual or attempted second and third degree sexual assault. See Neb. Rev. Stat. § 28-320.

---

[22] Nebraska's law differs from Arizona's in this respect, among several others relevant here. In Arizona, manslaughter is not a lesser included offense of felony murder because manslaughter requires a *mens rea* of recklessness or intent to kill. See Ariz. Rev. Stat. § 13-1103. In Nebraska, there is similarly no homicidal intent required for felony murder – but neither is there an intent element of manslaughter whether involuntary or (according to recent caselaw) voluntary. See *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994) (voluntary manslaughter requires no intent to kill).

A charge of sexual assault in the first degree necessarily includes a charge of sexual assault in the second degree. *State v. Tamburano*, 203 Neb. at 705. A charge of attempted first degree sexual assault necessarily includes the lesser charge of attempted second or third degree sexual assault. See *State v. Al-Zubaidy, supra* at *4-5; note 20, above.

It is thus plain – although, as the Solicitor General points out, it has never been considered by the state courts, Sol. Gen. Br. at 22n.15 – that in Nebraska a felony murder based on a charge of actual or attempted first degree sexual assault must include, in the strictest sense, the lesser crime of involuntary manslaughter.[23] Therefore, even under the restrictive approach the Nebraska Supreme Court has explicitly endorsed as governing criminal cases generally since 1993, the manslaughter instruction respondent asked for was obligatory. Had it been given there would be no *Beck* issue here. *Schad v. Arizona*, 501 U.S. 624, 647-48 (1991) (*Beck* satisfied by a single factually supported lesser offense instruction). But it was not, not only because the Nebraska courts did not follow *Beck* but also because they did not follow any of their own generally applicable rules governing lesser offense instructions.

---

[23] If first degree sexual assault includes second degree sexual assault, then homicide plus first degree sexual assault must include homicide plus second degree sexual assault. If attempted first degree sexual assault includes attempted second degree sexual assault, then homicide plus attempted first degree sexual assault must include homicide plus attempted second degree sexual assault.

C. The Refusal Of Any Lesser Offense Instructions In This Case Was Inexplicable Under Nebraska's Own Law.

None of the generally applicable state law rules governing lesser offense instructions discussed above were applied in this case; none were even considered. The trial court's response to defense counsel's arguments was incomprehensible. JA 9-10. The Nebraska Supreme Court's explanation of its decision was more polished but no more informative.

The Nebraska Supreme Court began by saying "[t]he critical difference between a felony murder charge and a regular first degree murder charge [was] with respect to intent," *State v. Reeves*, 216 Neb. 217 – ignoring the fact that one of respondent's requests was for an instruction on manslaughter which, like felony murder, contains no element of intent. It then recited the standard legislative rationale for equating premeditated and felony murder ("[t]he turpitude involved in the sexual assault takes the place of intent to kill or premeditated malice"), and then rephrased that unexceptionable principle of lawmaking policy[24] as an irrebuttable presumption of law ("the purpose to kill is conclusively presumed from the criminal intention required for sexual assault"). *Ibid.* Confusingly, one of the cases it cited in support of this statement said the very same "statement in *State v. Kauffman*, [183 Neb. 817, 164 N.W.2d 469 (1969)] . . . that 'the purpose to kill is conclusively presumed from the criminal intention for

[24] This Court has recognized that, as a policy matter, the historically common decision to equate premeditated and felony murder is rational. *Schad v. Arizona*, 501 U.S. at 643.

robbery' *is disapproved.*" *State v. Bradley*, 210 Neb. 882, 885, 317 N.W.2d 99 (1982) (emphasis added).

The other two cases it cited in support of this proposition both said that in a felony murder case it is "*ordinarily* error for the trial court to instruct the jury that it may find the defendant guilty of second degree murder or manslaughter, even though such an instruction is requested," language the *Reeves* opinion itself then went on to quote. *Ibid., quoting State v. Hubbard*, 211 Neb. 531, 534, 319 N.W.2d 116 (1982) (emphasis added); see also *State v. Montgomery*, 191 Neb. 470, 215 N.W.2d 881 (1974). However, the decision in *Reeves* provided no hint about when there might be an exception to this "ordinary" rule. *State v. Montgomery* had provided a possible example of such an exception – a robbery that was "an afterthought" to a homicide, a scenario similar to one defense counsel had argued the jury could infer here, JA 8, but the *Reeves* opinion evidenced no awareness of it.

Even more inexplicably, the *Reeves* opinion evidenced no awareness that the basic premise it was following – "the purpose to kill is conclusively presumed from the criminal intention required for sexual assault" – begged the question presented by this case. As the Nebraska Supreme Court itself noted elsewhere in its opinion,[25] the primary theory of the defense, and its basis for requesting lesser offense instructions, was that respondent lacked

[25] "The defendant at trial maintained that he was not guilty of the felony murder counts because of his inability to form the requisite intent needed for a first degree sexual assault or a first degree attempted sexual assault." *State v. Reeves*, 216 Neb. at 212.

the "criminal intent" from which the "purpose to kill" is said to be presumed. Surely, a "conclusive presumption" cannot flow from the *charge* of first degree sexual assault. One of the exceptions to the "ordinary" rule against lesser offense instructions therefore must arise when there is a doubt, based on lack of intent or otherwise, that an enumerated felony actually occurred.[26] The Nebraska Supreme Court's *Reeves* opinion seems wholly oblivious to that possibility, although it recognizes that is precisely the defense raised in the case at hand.

Closely considered, the Nebraska Supreme Court's decision on this issue in this case seems less to have applied state law than to have recited an often repeated passage from its previous cases[27] without considering

---

[26] Another difference between Nebraska and Arizona is that Arizona recognizes this possibility and will instruct on lesser offenses where there is evidence raising such a doubt. See, e.g., *Schad v. Arizona*, 501 U.S. at 629 (second degree murder instruction given); *State v. Detrich*, 178 Ariz. 380, 873 P.2d 1302 (1994) (lesser nonhomicide instruction required). Unlike Nebraska, Arizona has never purported to require all or nothing verdicts in felony murder cases; for example, the jury in *Greenawalt v. Ricketts*, 943 F.2d 1020 (9th Cir. 1991), *cert. denied*, 506 U.S. 888 (1992) – the case that brought this one here – was instructed on a variety of lesser crimes including robbery, kidnapping and motor vehicle theft, and returned separate convictions on them. *State v. Greenawalt*, 128 Ariz. 150, 624 P.2d 828 (1981).

[27] As petitioner notes, Nebraska cases have said things like "murder in the second degree and manslaughter are not included" in a felony murder charge because premeditation and intent to kill "are incontrovertibly presumed from the crime of rape" since *Morgan v. State*, 51 Neb. 673, 71 N.W. 788, 794 (1897). However, in some of the cases in which it has said that

whether and how it fit the evidence and arguments before it.

D. The Refusal To Give Respondent's Jury Any "Third Option" Was No Less Arbitrary Than The Statute Invalidated In Beck.

As the above discussion demonstrates, the reason for the refusal of respondent's request for lesser offense instructions was not, as petitioner claims, the "substantive state law" of Nebraska. Nebraska's general homicide and lesser offense law supported respondent's request. The Nebraska caselaw has historically spoken of a different, special rule for felony murder cases; but it has also acknowledged the possibility of exceptions to that rule, and it has left the scope of those exceptions as unclear as is the rationale for the rule itself.[28]

(including *Morgan* itself) lesser included offense instructions were given nonetheless. See *id.* at 71 N.W. 793; *MacAvoy v. State*, 144 Neb. 827, 831, 15 N.W.2d 45 (1944). *Thompson v. State*, 106 Neb. 395, 184 N.W. 68 (1921) (reversing manslaughter conviction after prosecutor elected to charge felony murder only); *Rhea v. State*, 63 Neb. 461, 88 N.W. 789, 799 (1902).

[28] Recent Nebraska Supreme Court cases have not cleared up the confusion. *State v. Price*, 252 Neb. 365, 373, 562 N.W.2d 340 (1997) refused to apply the Court of Appeals' decision below to a noncapital case, saying "[i]n Nebraska, there are no lesser included offenses to the crime of felony murder." A few weeks earlier, *State v. Nissen*, 252 Neb. 51, 82, 560 N.W.2d 157 (1997) said "it is clear that as this case was charged and tried, burglary is a lesser-included offense of felony murder in the sense that it would have been impossible for the jury to find that [the defendant] . . . committed felony murder without also finding that he committed the burglary."

All that is known for certain is this: although a rational juror could have found respondent guilty of either of two lesser degrees of homicide, and although the usual rules for instructing juries on lesser offenses in Nebraska criminal trials would have allowed respondent's jury to consider at least one of those options, that was not permitted here. Whether that is attributable to an anomalous and unreasoned state common law rule whose incoherence clouds its scope or to the failure of the Nebraska courts to rationally analyze how their rules applied to this case, the constitutional result is the same: for no good reason, respondent's "jury was not permitted to consider a verdict of guilt of a lesser included non capital offense, and when the evidence would support such a verdict," thus "introduc[ing] a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." *Beck v. Alabama*, 447 U.S. at 627, 643. The constitutional principle forbidding that applies not only to historically aberrant state law rules limited to capital cases, such as the one at issue in *Beck*, but also to aberrant and unjustified applications of state law in an individual case which produces the same result. *Spaziano v. Florida*, 468 U.S. 447, 456 (1984) (dictum); see also *Cordova v. Lynaugh*, 838 F.2d 764 (5th Cir. 1988); *Vickers v. Ricketts*, 798 F.2d 369 (9th Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987) (Kennedy, J.). The Court of Appeals correctly so applied *Beck*'s rule here.

III. THE COURT OF APPEALS CORRECTLY REJECTED THE ARGUMENT THAT BECK DOES NOT APPLY IN JUDGE SENTENCING STATES.

Petitioner's other argument below was that *Beck* turned on the fact that it "involved a statute that automatically imposed the death sentence, whereas Reeves's jury had no involvement in sentencing." See JA 60n.13. The Court of Appeals dismissed that contention in a footnote, pointing out that "the Alabama statute in *Beck* was not a 'mandatory death' statute," and saying "[t]his case is like *Beck:* the jury had no ultimate control over the imposition of a death sentence and could only choose to convict Reeves of a death-eligible crime or to acquit him." JA 61.

Unwilling to accept this, petitioner tries to refine this argument here. Its argument now is that, even if Alabama did not mandate death upon conviction, this Court's concern in *Beck* stemmed from the fact Alabama juries thought it did, whereas Nebraska juries have "no role whatsoever in the determination of . . . penalty. The distinction between the two situations could not be greater." JA 27-8.

However the size of the distinction is characterized, it is a distinction without a difference with respect to *Beck*'s constitutional concern. That concern was not, as petitioner would have it, with the possibility that juries might wrongly acquit guilty defendants in order to spare them death (JA 26); it was that juries might wrongly convict defendants of a capital offense when they were proved guilty only of a lesser one, in order to avoid

setting them free. The Court made this clear in *Schad v. Arizona*:

> Our fundamental concern in *Beck* was that a jury convinced that the defendant had committed some violent crime but not convinced that he was guilty of a capital crime might nonetheless vote for a capital conviction if the only alternative was to set the defendant free with no punishment at all. . . . As we later explained in *Spaziano v. Florida*, 468 U.S. 447, 455, 104 S.Ct. 3154, 3159, 82 L.Ed.2d 340 (1984), "[t]he absence of a lesser included offense instruction increases the risk that the jury will convict . . . simply to avoid setting the defendant free. . . . The goal of the *Beck* rule, in other words, is to eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence." See also *Hopper v. Evans*, 456 U.S. 605, 609, 102 S.Ct. 2049, 2051-2052, 72 L.Ed.2d 367 (1982).

501 U.S. 646-47.

Contrary to petitioner's claim, the danger of injustice resulting from such an "all-or-nothing choice" is magnified, not reduced, by the jury's lack of any control or involvement in the sentencing decision. A jury that believes that a guilty verdict inevitably means death, as petitioner claims Alabama juries did at the time of *Beck*, surely is the least likely of all juries to render a guilty verdict about which it has doubts. Compared to juries in that extreme situation, a jury in a system like Florida's can be expected to be more likely to err on the side of

conviction because it can reassure itself that its sentencing recommendation will modulate the injustice. Presumably, that is why the Court in *Spaziano* thought the *Beck* problem applied to the Florida system. A system like Nebraska's, on the other hand, creates the greatest possible danger of wrongful convictions and death sentences – for a Nebraska jury is neither deterred by the specter of automatic death nor able to channel its doubts into a non-death decision or recommendation at the sentencing phase. Presumably, again, that is why the Court in *Schad v. Arizona* clearly believed that *Beck*'s principles applied to Arizona's system, which is identical to Nebraska's in this regard. See also *Vickers v. Ricketts, supra.*

Petitioner's position on this point thus turns *Beck*'s logic on its head. To the extent *Beck* was concerned with wrongful acquittals, that concern was clearly secondary to its concern about the danger of wrongful capital convictions. Indeed, in other (but related) contexts the Court has said that the possibility some other defendant might have been wrongly acquitted or spared death does not give rise to a constitutional claim. *McCleskey v. Kemp*, 481 U.S. 279, 307 (1987); *Gregg v. Georgia*, 428 U.S. 156, 199 (1976).[29] The possibility that a defendant was himself wrongly made subject to death by a jury that wanted only to avoid setting him free emphatically does raise a constitutional concern; and that possibility was maximized by

---

[29] *Hopper v. Evans* made it clear that this principle applies to *Beck*'s rule. It was the absence of any danger of wrongful conviction that defeated John Evans' claim. 456 U.S. at 613. The danger of wrongful acquittal in his case was as great as in any other – or greater, since in Evans' case an acquittal would have been so clearly wrongful.

the form of the proceedings here. The Court of Appeals got it right on this point, as well.

IV. BECAUSE THE COURT OF APPEALS' DECISION WAS DICTATED BY *BECK v. ALABAMA* AND *SPAZIANO v. FLORIDA*, BOTH OF WHICH WERE DECIDED BEFORE THIS CONVICTION WAS FINAL, THIS CASE PRESENTS NO ISSUE OF RETROACTIVITY.

Petitioner's last refuge from *Beck* is *Teague v. Lane*, 489 U.S. 288 (1989). Pet. Br. 37-46. It seeks that refuge for the first time in this Court; it did not make a *Teague* argument below[30] and the Court of Appeals did not feel compelled to consider *Teague* on its own, presumably because it thought its decision was dictated by *Beck*.

As is plain from the arguments above, if that was its belief, we submit it was correct. Petitioner's efforts to find a distinction between this case and *Beck* are wholly unconvincing. The interpretations put on the Court of Appeals' opinion by petitioner's *amici* apparently stem from unfamiliarity with Nebraska law and the record of this case.

---

[30] If there were a serious *Teague* argument here, this case would present the unresolved question of whether such a claim is waived when it is not presented to the courts below, even on rehearing. We would submit it should be waived; a contrary rule would invite states to do what appears to have been done here – "sandbagging" the *Teague* defense until all substantive arguments have failed in the lower courts, and then use it to attack the lower court decisions without giving the judges below a chance to consider or respond to the issue.

That is understandable: as we have shown, a careful review of Nebraska law and the case record leaves considerable confusion about the precise reason for the Nebraska courts' refusal to allow respondent's jury to consider the lesser homicide offenses the evidence supported. But what is clear is that the upshot of their decision had all the core elements of the situation in *Beck*: (1) respondent was sentenced to death (2) upon a conviction returned by a jury that was given an "all or nothing" choice although (3) the facts would have supported a conviction on lesser offenses defined by state law and (4) instructions on those lesser offenses would have been given under the state's generally applicable rules of criminal procedure. The Nebraska Supreme Court did not render its decision approving this in reliance on pre-*Beck* law, see *Teague v. Lane*, 489 U.S. 306-307, but in willful disregard of *Beck*, which was presented to it but ignored.

It may have done that because Nebraska has a rule against lesser offense instructions in felony murder cases so procrustean and irrational that it will not even admit exceptions in cases where, as here, there is evidence the enumerated felony did not occur. Or it may have done that because of a mistaken application of a reasonable rule to a case where it could not logically apply. Either way, the retroactivity analysis is the same. The invalidity of the first possibility is dictated by *Beck* itself; the invalidity of the second is dictated by the analysis in *Spaziano v. Florida, supra*,[31] which was also

---

[31] *Spaziano* clearly established that *Beck* applied to case-specific errors, albeit it did so in *dictum*. See *Stringer v. Black*, 503 U.S. 222, 235-36 (1992) (constitutional rule may be dictated by analysis in prior decisions).

decided before respondent's conviction became final.[32] In either case, there is no *Teague* problem here.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

PAULA HUTCHINSON*
5815 S. 58th Street, Suite C3
Lincoln, NE 68516
(402) 420-2156

KENT GIPSON
Public Interest Litigation Clinic
5319 Rockhill Road
Kansas City, MO 64110
(816) 363-2795

TIMOTHY K. FORD
MACDONALD, HOAGUE & BAYLESS
705 2nd Avenue, Suite 1500
Seattle, WA 98104
(206) 622-1604

Attorneys for Respondent

**Counsel of Record*

December 22, 1997.

---

[32] *Spaziano* was decided July 2, 1984. 468 U.S. 447. Respondent's conviction became final November 13, 1984. JA 1.

(8)

No. 96-1693

In The

Supreme Court of the United States

October Term, 1997

FRANK X. HOPKINS, Warden,
Nebraska State Penitentiary,

Petitioner,

v.

RANDOLPH K. REEVES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONER'S REPLY BRIEF ON THE MERITS

DON STENBERG
Attorney General

J. KIRK BROWN
Counsel of Record
Assistant Attorney General
P.O. Box 98920
Lincoln, Nebraska 68509-8920
Tel: (402) 471-2682

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

20 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RULES

ARGUMENT

Introduction

Beck v. Alabama, 447 U.S. 625 (1980), should not be read as announcing a federal constitutional commandment that our state and federal governments must enact lesser included offenses of every potentially capital offense under an 8th Amendment theory, or enact lesser included offenses of every known criminal offense under a Due Process Clause theory. That would represent an unwarranted judicial invasion of the legislative power.

By the same token, *Beck* should not be read as announcing a federal constitutional commandment that our state and federal governments must abandon their traditional lesser included offense jurisprudence simply to provide "lesser" offenses for juries to consider in potentially capital cases (8th Amendment), or to provide merely "lesser" offenses for juries to consider in every criminal case tried in this country (Due Process Clause).

For each of the reasons set forth below, Reeves' brief does nothing to alter those realities.

I.

The concept of lesser "related" offenses is not known to Nebraska law.

Reeves asserts that "Nebraska has always followed a 'lesser related offense' rule in all homicide prosecutions except felony murder." Respondent's Brief, p. 37. That statement does not accurately reflect the law of the State of Nebraska.

Our research has failed to disclose a single instance in which the term "lesser *related* offense" has been employed by the Nebraska courts.

The fact is that the Nebraska Supreme Court employs a lesser "included" offense analysis, not just in felony murder cases but in *all* first degree murder cases[1] and all *other* crimes tried within that jurisdiction.

Under either an "elements" or a "cognate" test, both of which the Nebraska Supreme Court has employed at times, the goal of the analysis remained the same: The determination of whether a lesser offense was "included" in the crime charged.[2] In that context, it is noteworthy that even as the Nebraska Supreme Court experimented with both the cognate and elements tests of lesser included offenses, the Nebraska Supreme Court never wavered in its conclusion that there existed no lesser included homicide offenses of first degree felony murder under Nebraska law. See Petitioner's Brief, p. 15.

---

[1] E.g., *State v. Ryan*, 248 Neb. 402, 534 N.W.2d 766, 778 (1995) and *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507, 519 (1994) (lesser included offenses of first degree premeditated murder exist under Nebraska law); *State v. Price*, 252 Neb. 365, 562 N.W.2d 340, 346 (1997) (there exist no lesser included homicide offenses to the crime of first degree felony murder).

[2] E.g., *State v. Garza*, 236 Neb. 202, 459 N.W.2d 739, 742 (1990) (abandoned elements test for cognate-evidence test); *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561, 566 (1993) (returned to elements test).

II.

Nebraska's lesser included offense jurisprudence is not the legal or functional equivalent of the statute found unconstitutional in *Beck*.

It is not clear to the petitioner, but if Reeves is attempting to argue that the Alabama statute found unconstitutional in *Beck* is the federal constitutional equivalent of Nebraska's well established lesser included offenses jurisprudence, that assertion is also inaccurate.

The statute found unconstitutional in *Beck* had application solely to crimes for which a penalty of death was to be imposed, this raises 8th Amendment concerns. The lesser included offense standard employed by the Nebraska Supreme Court is not limited in its application to first degree murder prosecutions, but is *uniformly* applied to *all* crimes tried in Nebraska. E.g., *Wiedman v. State*, 141 Neb. 579, 4 N.W.2d 566 (1942) (rape); *Haffke v. State*, 149 Neb. 83, 30 N.W.2d 462 (1948) (operating a motor vehicle on the public highways under the influence of alcoholic liquors); *Mulder v. State*, 152 Neb. 795, 42 N.W.2d 858 (1950) (assault with intent to do great bodily harm); *State v. McClarity*, 180 Neb. 246, 142 N.W.2d 152 (1966) (robbery); *State v. LaPlante*, 183 Neb. 803, 164 N.W.2d 448 (1969) (assault of a police officer); *State v. Null*, 247 Neb. 192, 526 N.W.2d 220 (1995) (bribery); *State v. Detweiler*, 249 Neb. 485, 544 N.W.2d 83 (1966) (armed robbery); *State v. McBride*, 252 Neb. 866, 567 N.W.2d 136 (1977) (attempted first degree assault), *State v. Cebuhar*, 252 Neb. 796, 567 N.W.2d 129 (1997) (3rd degree assault of a police officer).

Thus, while the unconstitutional statute in *Beck* was limited in its application to capital offenses and thus implicated unique 8th Amendment concerns, Nebraska's lesser included offense jurisprudence has uniform application which extends well beyond the constitutionally unique environment of capital litigation.

III.

This Court has exercised jurisdiction over this case to resolve a federal constitutional question, not to resolve the respondent's dissatisfaction with the Nebraska Supreme Court upon a settled question of state law.

A.

In the 22 pages of argument here offered by Reeves, 14 pages[3] forward argument perhaps appropriate before the Nebraska Supreme Court, but not appropriate before this Court.

This body of argument exclusively addresses Reeves' disagreement with a century of Nebraska Supreme Court precedent on a pure question of state law: Are second degree murder and manslaughter lesser included offenses of the crime of first degree murder charged under a felony murder theory?

As we understand it, this Court is not burdened with the responsibility of addressing questions of state law for disgruntled state litigants. Under our federal system of government, and particularly in the context of a Due Process Clause analysis, a state's substantive law is not a

[3] Respondent's Brief, pages 30-44.

variable, but the fixed point from which any federal constitutional analysis must proceed. *Wolff v. McDonnell*, 418 U.S. 539 (1974). That point is fixed by the highest court of the state in question. State substantive law must be the exclusive province of the states and their courts.

However, Reeves urges this Court to substitute its judgment for that of the Nebraska Supreme Court on the question of what constitutes a lesser included offense of first degree felony murder under Nebraska law. For any federal court to assume responsibility for announcing or establishing the substantive law of a state is the antithesis of our American form of government and a path this Court has scrupulously and consistently rejected in the past. *Johnson v. Fankell*, 520 U.S. ___, 117 S.Ct. 1800, 1803-4, 138 L.Ed.2d 108, 115 (1997), citing *New York v. Ferber*, 458 U.S. 747 (1982).

If Reeves' proposition were to be adopted under a Due Process Clause theory, then every state and federal court's determination of what does or does not constitute a lesser included offense of the crime charged will suddenly and unnecessarily assume a previously unrecognized federal constitutional dimension. For example, in *State v. Gonzales*, 218 Neb. 43, 352 N.W.2d 571, 574 (1984), the defendant argued that trespass was a lesser included offense of the charged crime of burglary. The Nebraska Supreme Court rejected that proposition under the same state law analysis as employed in denying Reeves his requested lesser included offense instructions.

B.

In the specific context of *Beck* and its progeny, this Court has never taken it upon itself to alter the substantive lesser included offense jurisprudence of a state. Instead, this Court has evaluated the federal constitutional implications of a state's lesser included offense jurisprudence *as defined by* that state's highest court.

Neither in *Beck*, nor *Hopper*, nor *Spaziano*, nor *Schad* did this Court second guess the highest court of the state in question with regard to that state's lesser included offense jurisprudence, nor did this Court alter a state's substantive lesser included offense law in the process of resolving those cases. Consistent with those holdings, this Court should decline Reeves' invitation to take a radically different approach in this case.

For example, in *Beck*, the unconstitutional statute specifically denied a criminal defendant charged with a mandatorily capital crime the benefit of instructions upon lesser included offenses otherwise existing and recognized under Alabama substantive law. Once that statute was voided by this Court, Alabama's substantive lesser included offense jurisprudence remained unaltered and applicable to Beck's case.

IV.

Reeves fails to meet either step of a *Beck* lesser included offense analysis.

The question of whether lesser included offense instructions may appropriately be given involves at least a two step analysis: (1) Do lesser included offenses of the

crime charged exist? (2) If lesser included offenses do exist, would the record support the giving of an instruction upon that lesser included offense?[4] Reeves fails at both steps of the analysis.

A.

No lesser included homicide offenses exist.

First, under Nebraska law there exist no lesser included homicide offenses of the crime of first degree felony murder. Reeves does not dispute this fact. Instead, Reeves and the circuit court simply ignore this crucial step of the analysis.

One cannot engage in an appropriate lesser included offense analysis if one begins by first *ignoring* the elements of the crime with which the defendant is charged. Here Reeves was charged with first degree murder under a felony murder theory. Any "lesser" offense would have to be "included" within the elements of *that* offense. Again, the Nebraska Supreme Court has held for a century that the "lesser" crimes of second degree murder and manslaughter for which Reeves requested instructions are not lesser included offenses of the crime with which Reeves was charged.

---

[4] *Beck* at 636-637.

B.

The record does not support the requested instruction.

Having determined that the lesser offenses for which Reeves requested instructions are *not* lesser included offenses of the crime of first degree felony murder under Nebraska law, there exists no reason to engage in the second step of the traditional analysis recommended by this Court in *Beck*.

However, that is where Reeves *begins* his analysis. Reeves argues that the record at his trial would have supported a conviction of either manslaughter or second degree murder. Respondent's Brief, p. 28. Reeves is in error in that assertion as well. We offer the following in addition to our previously forwarded argument of this question.[5]

1.

While admitting that this record will not support it, Reeves nonetheless asserts that the petitioner conceded below that the record of Reeves' trial would have supported convictions for second degree murder or manslaughter. Respondent's Brief, p. 28. We have no recollection of that concession having been made.

[5] See our discussion of the second step of a *Beck* analysis found at pages 19-20 of the Petitioner's Brief on the Merits.

2.

More important, however, is the fact that the alleged admission, even if accurately represented, would be irrelevant to an appropriate analysis of this case.

This record cannot appropriately be examined from an abstract point of view which asks: "What crimes may have been committed here?" A lesser included offense analysis must begin *exclusively* in the context established by the crime charged by the sovereign.

a.

Reeves' argument ignores the undisputed fact that his state trial court specifically concluded that the record at his trial would not have supported the giving of the lesser offense instructions requested, even if there had existed lesser included homicide offenses of the crime charged. JA 3. We believe that finding is entitled to deference in this forum.

b.

Next, Reeves ignores the fact that his intoxication defense at trial was intended to accomplish one of two things: Prevent a finding that he formed the requisite intent for the first degree sexual assault, or establish that he was legally insane at the time of the offense.[6]

[6] The fact that Reeves actually committed these two homicides was never contested.

c.

In Nebraska, a lesser included offense instruction is only warranted where the defendant offers a theory which would allow him to be acquitted of the crime charged, but found *guilty* of the lesser included offense. *State v. Grant*, 242 Neb. 364, 495 N.W.2d 253, 259 (1993); *State v. Massa*, 242 Neb. 70, 493 N.W.2d 175 (1992).

d.

If Reeves were successful in convincing his jury that his voluntary intoxication prevented him from forming the requisite intent to commit a first degree sexual assault, that same level of intoxication would have also negated the intent to kill essential to conviction for the crime of second degree murder.[7]

e.

Next, Reeves argued that he was entitled to a lesser included offense instruction on manslaughter. Under Nebraska law the crime of manslaughter may be committed under one of two factual scenarios: either "upon a sudden quarrel" or "unintentionally while in the commission of an unlawful act."[8]

---

[7] Neb. Rev. Stat. § 28-304 (1995): "A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation."

[8] Neb. Rev. Stat. § 28-305 (1995): "A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act."

"Sudden quarrel" manslaughter was not available to Reeves as a lesser included offense because the element of "sudden quarrel" is not common to the charged offense of first degree felony murder.

The commission of "unlawful act" manslaughter hinges upon the commission of an unlawful act. The only unlawful act alleged by the state here was the first degree sexual assault of Janet Mesner. First, if the only unlawful act alleged by the state is one of the enumerated predicate felonies of a felony murder, then there exists no theory under which Reeves' jury could have found him not guilty of felony murder but guilty of unlawful act manslaughter.

Second, sexual assault is a specific intent crime[9] which Reeves argued at trial he lacked the intent to commit. Again, if Reeves had lacked the ability to form the intent to commit the first degree sexual assault as the predicate felony to first degree felony murder, then he would have also lacked the intent necessary to establish the same predicate "unlawful act" for the crime of unlawful act manslaughter. Thus, instruction upon unlawful act manslaughter as a lesser included offense of first degree felony murder was not legally or factually appropriate on this record.[10]

---

[9] JA 14.

[10] In the context of manslaughter, on this record it is also difficult to characterize these murders as "unintentional" when Reeves repeatedly inflicted mortal stab wounds to one victim and then stabbed his other victim cleanly through the heart in a single thrust.

f.

Finally, the fact is that Reeves' jury concluded that Reeves *did* possess the requisite criminal intent to commit the first degree sexual assault of Janet Mesner. Reeves' sole, intent-related defense having been rejected by his jury, he is in fact guilty of the crime with which he was charged, not of a "lesser" offense.

V.

Nebraska law recognizes lesser included offenses of first degree felony murder, but those do not include second degree murder or manslaughter.

A.

Reeves argues there is much confusion in Nebraska law on what constitutes lesser included offenses. However, on the specific question before this court – Are second degree murder and manslaughter lesser included offenses of first degree felony murder – Nebraska law is abundantly clear and consistent. See Petitioner's Brief, p. 15.

B.

While in *State v. Montgomery*, 191 Neb. 470, 215 N.W.2d 881 (1974)[11] the Nebraska Supreme Court may have left open the possibility that extraordinary and unspecified circumstances might arise in which an exception could occur, the fact is that in nearly 150 years of

[11] Cited by Reeves at p. 41 and by *amici* National Association of Criminal Defense Lawyers at pp. 12-14.

criminal trials in Nebraska no such extraordinary circumstances have been observed and Reeves' situation does not create them. Reeves offers no authority to the contrary.

C.

Contrary to the argument of Reeves' *amici*,[12] Nebraska law does recognize that the predicate felony of a first degree felony murder charge is a lesser included offense of the crime charged. *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 159, 178 (1997). However, as we have noted previously,[13] Reeves strategically elected *not to request* a separate instruction upon the predicate felony in this case. Instead, he requested instruction upon two crimes not recognized by Nebraska law as lesser included offenses of the crime with which Reeves was charged.

The Nebraska Supreme Court's statement in *State v. Price*, 252 Neb. 365, 562 N.W.2d 340, 346 (1997) that "there are no lesser included offenses to the crime of felony murder" must be read in the context that the appellant in *Price* was making exactly the same claim that had failed for Reeves and many others before him. The language from *Price* does not alter or contradict that court's holding in *Nissen*.

[12] Brief *Amicus Curiae* of the National Association of Criminal Defense Lawyers, pp. 12-14.

[13] Petitioner's Brief on the Merits, p. 32, fn. 28.

VI.

Petitioner's *Teague* claim is appropriately before the Court.

A.

This Court has indicated that questions of *Teague* waiver in this forum are ultimately addressed to the sound discretion of this Court. "[W]e undoubtedly have the discretion to reach the State's *Teague* argument." *Schiro v. Farley*, 510 U.S. ___, 114 S.Ct. 783, 127 L.Ed.2d 47, 56 (1993).

We believe that discretion has been appropriately exercised in this case by this Court's granting of a writ of certiorari with respect to Question #4.

B.

There are good reasons for a discretionary approach to *Teague* questions in this forum.

The concerns surrounding a *Teague* claim raised before this Court are significantly different than in the lower federal courts. The broad policy impact and systemic importance of the concerns which produced the *Teague* rule in the first instance recommend such an approach.

A *Teague* claim does not turn upon questions of disputed fact, but upon an accurate reading of the prior rulings of this Court. Therefore, this Court must review any *Teague* claim *de novo*. Thus, while the lower federal courts may be obliged to opine upon whether the rule urged by the state prisoner is a new rule of federal

constitutional law, only this Court has the power to dispositively resolve that question. Only this Court has the power to dispositively interpret the meaning of this Court's prior cases for our state and federal courts.

As this Court observed in *Schiro*, a party before this Court is entitled to raise any legal argument in support of its position. *Id.*, 127 L.Ed.2d at 56, citing *Dandridge v. Williams*, 397 U.S. 471 (1970). The concern in *Schiro*, relied upon by Reeves, was principally the State's failure to raise its *Teague* concerns at the *certiorari* stage of this Court's evaluation of the case. Those facts are not present here. See Petition for Writ of Certiorari, Questions Presented.

C.

We also note that the "new rule" at issue here is not a rule that Reeves urged below. Reeves had simply argued that instructions upon second degree murder and manslaughter were required under *Beck* as lesser *included* offenses.

It is the circuit court which departed from the lesser *included* offense context of *Beck* and its progeny, and in its place announced a federal constitutional mandate of instructions upon lesser *related* offenses regardless of the substantive law of the state in question.

Only this Court can dispositively enlighten us on the question of whether the circuit court's understanding of the demands of *Beck* is "new" to our federal constitutional jurisprudence. We proceed upon the assumption that this Court granted its writ of certiorari with respect to Question #4 in order to do so.

CONCLUSION

We believe the result here should be governed by 8th Amendment concerns. From an 8th Amendment standpoint *Beck* does not apply to Reeves' situation because Reeves' jury was not *commanded* by Nebraska law to impose a sentence of death or release Reeves from state custody. In fact, Reeves' jury was completely aware they had no role whatsoever in the determination of an appropriate punishment for Reeves if he was found guilty. Thus, Reeves' jury was not placed in a situation where concerns over punishment (mandatory or discretionary) might legitimately be argued to have impacted that jury's determination of Reeves' guilt. The mandatory death/impact-on-jury-deliberation concerns of *Beck* are simply not present here.

On the other hand, if a Due Process Clause analysis is deemed necessary, *Beck* does not apply to Reeves' situation because under Nebraska law, as defined by the Nebraska Supreme Court, Reeves was denied no recognized state law right to the lesser included offense instructions he requested.

Respectfully submitted,

DON STENBERG
Attorney General

J. KIRK BROWN
Counsel of Record
Assistant Attorney General
P.O. Box 98920
Lincoln, Nebraska 68509-8920
Tel: (402) 471-2682

(5)

No. 96-1693

In the Supreme Court of the United States

OCTOBER TERM, 1997

FRANK X. HOPKINS, WARDEN, PETITIONER

v.

RANDOLPH K. REEVES

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

SETH P. WAXMAN
Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
ROY W. MCLEESE III
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

38 pp

QUESTION PRESENTED

Whether *Beck* v. *Alabama*, 447 U.S. 625 (1980), entitles the defendant in a capital case to an instruction that permits the jury to find the defendant guilty of non-capital offenses, even where those non-capital offenses were not charged and, under applicable law, are not lesser-included offenses of the charged capital crime.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes and rules:

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 96-1693

FRANK X. HOPKINS, WARDEN, PETITIONER

v.

RANDOLPH K. REEVES

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

One of the questions presented in this case is whether *Beck* v. *Alabama*, 447 U.S. 625 (1980), entitles the defendant in a capital case to an instruction that permits the jury to find the defendant guilty of non-capital offenses, even where those non-capital offenses were not charged and, under applicable law, are not lesser-included offenses of the charged capital crime. The Court's resolution of that question could affect the jury instructions given in federal capital proceedings.[1]

---

[1] The Court limited its grant of certiorari to the first, second, and fourth questions raised by petitioner. *Hopkins* v.

STATEMENT

1. In the early morning on March 29, 1980, in Lincoln, Nebraska, Janet L. Messner made an emergency 911 call, reporting that she had been stabbed and that she believed a friend of hers had been killed. When police responded to the residence from which the call was made, they found Ms. Messner lying on the floor, suffering from seven stab wounds to her chest. Ms. Messner told the police that she had been raped and stabbed by respondent, Randolph K. Reeves, who she said was her cousin. Ms. Messner subsequently died as a result of her wounds. *State* v. *Reeves*, 344 N.W.2d 433, 438-439 (Neb.), cert. denied, 469 U.S. 1028 (1984).

Elsewhere in the residence, the police found the partially clad body of Victoria L. Lamm. Ms. Lamm had been fatally stabbed in the chest. The bedroom in which Ms. Lamm's body was found reflected a violent struggle. A billfold containing respondent's identification was on the floor near Ms. Lamm's body, respondent's underwear was on the bed, and one of his socks was on the floor near the bed. The underwear contained spermatozoal secretions of respondent's type. Ms. Lamm's two-year-old daughter was also in the residence, but was unharmed. Less than an hour after Ms. Messner's emergency call, respondent was arrested some blocks away from the scene of the murders. On his body and clothes was blood of the same type as Ms. Messner's blood. Respondent, who had consumed alcohol and peyote, gave a statement in

---

Reeves, 118 S. Ct. 30 (1997). In this brief, we address the first two questions, which we have consolidated into a single question. We do not address the fourth question, which involves the application of *Teague* v. *Lane*, 489 U.S. 288 (1989), to the rule announced by the court of appeals in this case.

which he said that he could not recall much about the murders, but did recall having raped and stabbed Ms. Messner. 344 N.W.2d at 438-439.

2. Respondent was charged with two counts of first-degree felony murder in the commission or attempted commission of a first-degree sexual assault. 344 N.W.2d at 438. He pleaded not guilty. At trial, his defense was that his consumption of alcohol and peyote had rendered him either insane or incapable of forming the intent required to commit a first-degree sexual assault. *Id.* at 440. Respondent requested that the jury be instructed on the offenses of second-degree murder and manslaughter. The trial court denied that request, because, under Nebraska law, neither offense is a lesser-included offense of felony murder. *Id.* at 442.[2] Respondent was found guilty of both felony-murder counts. *Id.* at 440. Pursuant to Nebraska law, a three-judge panel sentenced respondent, imposing a sentence of death on each count. *Ibid.*

3. Respondent appealed, challenging, *inter alia*, the trial court's refusal to instruct the jury on second-degree murder and manslaughter. 344 N.W.2d at 442. The Supreme Court of Nebraska rejected respondent's argument on that point, explaining that under Nebraska law neither offense is a lesser-included offense of felony murder. *Ibid.* (citing, *e.g.*, *State* v. *Hubbard*, 319 N.W.2d 116 (Neb. 1982)). The court rejected respondent's other contentions and affirmed his convictions and sentences. *Id.* at 449.

---

[2] Nebraska's first-degree murder, second-degree murder, and manslaughter statutes are reproduced in the Appendix to this brief, *infra*, 1a-2a.

Respondent unsuccessfully sought relief in state collateral proceedings. *State* v. *Reeves*, 453 N.W.2d 359 (Neb. 1990). He filed a petition for a writ of certiorari, and this Court granted the petition, vacated the judgment, and remanded the case for further consideration in light of *Clemons* v. *Mississippi*, 494 U.S. 738 (1990). *Reeves* v. *Nebraska*, 498 U.S. 964 (1990). On remand, the Supreme Court of Nebraska once again affirmed respondent's convictions and sentences. *State* v. *Reeves*, 476 N.W.2d 829 (1991), cert. denied, 506 U.S. 837 (1992).

4. Respondent then applied for a writ of habeas corpus in federal district court, pursuant to 28 U.S.C. 2254. One of respondent's claims was that the trial court had violated the requirements of *Beck* v. *Alabama*, 447 U.S. 625 (1980), by refusing to instruct the jury on second-degree murder and manslaughter, thereby submitting the case to the jury solely on the two capital counts. The district court rejected that claim, explaining that second-degree murder and manslaughter are not lesser-included offenses of felony murder under Nebraska law, and that *Beck* did not require that a jury be instructed on uncharged offenses that are not lesser-included offenses under state law. *Reeves* v. *Hopkins*, 871 F. Supp. 1182, 1205-1206 (D. Neb. 1994) (citing *Greenawalt* v. *Ricketts*, 943 F.2d 1020, 1029 (9th Cir. 1991), cert. denied, 506 U.S. 888 (1992)).

5. After further proceedings involving other claims,[3] the court of appeals eventually addressed respondent's *Beck* claim. It held that the trial court

[3] See *Reeves* v. *Hopkins*, 76 F.3d 1424 (8th Cir.), cert. denied, 117 S. Ct. 307 (1996), on remand, 928 F. Supp. 941 (D. Neb. 1996).

had violated the requirements of *Beck* by refusing to instruct the jury on second-degree murder and manslaughter. *Reeves* v. *Hopkins*, 102 F.3d 977, 981-987 (8th Cir. 1996) (reproduced in pertinent part at Pet. App. 1-16).

The court interpreted *Beck* as establishing a rule that, in a capital case, a State "may not prohibit an instruction on a noncapital charge that the evidence supports." Pet. App. 15. It further held that *Beck*, so understood, required the trial court in the present case to instruct the jury on second-degree murder and manslaughter. *Ibid.* The court accepted that, under Nebraska law, second-degree murder and manslaughter are not lesser-included offenses of felony murder. *Id.* at 8. It concluded, however, that *Beck* could not be distinguished on that basis, because *Beck* itself invalidated a state law that prohibited lesser-included-offense instructions in a capital case. *Id.* at 9. Thus, the court believed, state law alone cannot justify a trial court's failure to give an instruction under *Beck*. *Ibid.*

The court of appeals also found support for its holding in Nebraska's "rationale for prohibiting instructions for noncapital murder in felony murder cases." Pet. App. 12. As the court explained, Nebraska treats non-capital murder offenses as not included in felony murder because non-capital murder offenses require a culpable mental state with respect to the killing, while felony murder does not. *Ibid.*[4] According to the court of appeals, however, that rationale "disappears when the defendant is sentenced to death." *Id.* at 13.

[4] See, *e.g.*, *State* v. *Masters*, 524 N.W.2d 342, 348 (Neb. 1994); *State* v. *Hubbard*, 319 N.W.2d at 118; *State* v. *Montgomery*, 215 N.W.2d 881, 883 (Neb. 1974).

The court reached that conclusion because, in a capital prosecution based on felony murder, the State must in any event establish a level of culpability with respect to the killing in order to impose the death sentence. *Id.* at 12-15 (citing *Enmund* v. *Florida*, 458 U.S. 782 (1982); *Tison* v. *Arizona*, 481 U.S. 137 (1987)). The court therefore found itself "led to the conclusion that the State may not, consistent with the Constitution, bar an instruction on noncapital homicide, in a felony murder case where the death sentence is imposed, on the basis that felony murder requires no showing of intent or, at least, a reckless indifference to the value of human life." *Id.* at 13.

Because the court of appeals concluded that respondent's jury had not been instructed on a non-capital charge supported by the evidence, it granted a conditional writ of habeas corpus. Pet. App. 14-16. The court ordered that respondent's convictions would be vacated subject to a new trial unless the State modified respondent's death sentences to sentences of life imprisonment. *Id.* at 15-16.[5]

---

[5] The court explained that modification of respondent's sentence would cure the *Beck* violation because, as the court had previously held, the Due Process Clause does not require that lesser-included-offense instructions be given in a non-capital case. Pet. App. 15-16 (citing *Pitts* v. *Lockhart*, 911 F.2d 109, 112 (8th Cir. 1990), cert. denied, 501 U.S. 1253 (1991)). See also, *e.g.*, *Bagby* v. *Sowders*, 894 F.2d 792, 795-797 (6th Cir.) (en banc) (refusal to instruct on lesser-included offenses in non-capital case does not violate Due Process Clause; citing cases from the Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits), cert. denied, 496 U.S. 929 (1990); but see *Vujosevic* v. *Rafferty*, 844 F.2d 1023, 1026 (3d Cir. 1988). Therefore, the court held, the failure to give the requested instructions undermined the validity only of the death sentences, not of respondent's underlying felony-murder convictions. Pet. App. 15-16. Respondent did not cross-petition to contest the adequacy of the remedy afforded to him, and that issue is thus not before the Court. See, *e.g.*, *Northwest Airlines, Inc.* v. *County of Kent, Michigan*, 510 U.S. 355, 364 (1994).

SUMMARY OF ARGUMENT

In *Beck* v. *Alabama*, 447 U.S. 625 (1980), this Court held that it violated the Constitution for Alabama to withdraw from the jury in a capital case the option, which otherwise would have existed under Alabama law, of finding the defendant guilty of a lesser-included offense that was supported by the evidence. Nowhere in *Beck* did the Court suggest that the Constitution requires trial judges to instruct juries in capital cases on non-capital offenses that are not charged and that, under applicable law, are not lesser-included offenses of the capital charge. The Court's subsequent cases establish that *Beck* stands for a much narrower proposition: the Constitution prohibits a State from erecting "artificial" barriers that restrict the jury to an all-or-nothing choice between capital conviction and acquittal. *California* v. *Ramos*, 463 U.S. 992, 1007 (1983). It does not require a trial court to give instructions on offenses that are not lesser-included offenses under generally applicable state law.

It has long been settled under Nebraska law that second-degree murder and manslaughter are not lesser-included offenses of felony murder. See, *e.g.*, *Morgan* v. *State*, 71 N.W. 788, 794 (Neb. 1897). That substantive principle of Nebraska law "does not offend federal constitutional standards," *Hopper* v. *Evans*, 456 U.S. 605, 612 (1982), and it justified the Nebraska trial court's refusal to instruct the jury in this case on second-degree murder and manslaughter.

An extension of *Beck* to require trial courts to instruct on non-capital offenses, even when those offenses are not included within the charged offense under applicable law, would have highly undesirable consequences. First, it would require the federal courts to develop a test to determine when such uncharged offenses are sufficiently related to the charged capital offense as to require submission to the jury. The Court has twice in recent years concluded that efforts to develop similar tests were unworkable. See *United States* v. *Dixon*, 509 U.S. 688, 711-712 (1993); *Schmuck* v. *United States*, 489 U.S. 705, 720-721 (1989). Second, the approach adopted by the court of appeals in this case would raise difficult issues relating to the power of capital defendants to waive their rights to adequate notice of the charges against them and, in the federal system, to indictment by a grand jury. Third, the approach adopted by the court of appeals would create the risk of unfair surprise, because it would apparently grant defendants the right to choose, during trial, to place entirely new offenses before the jury.

The court of appeals erred in believing that *Beck* justified overriding Nebraska law on lesser-included offenses because *Beck* itself had invalidated a state law. *Beck* held that a State may not single out a capital crime and refuse to give a lesser-included-offense instruction where the defendant would otherwise be entitled to such an instruction under state law. *Beck* does not justify the conclusion that, even where generally applicable state law would bar the giving of a lesser-included-offense instruction, the Constitution requires state courts to devise procedures to instruct on some non-lesser-included offense. Nor is the court of appeals' approach supported by

this Court's decisions in *Tison* v. *Arizona*, 481 U.S. 137 (1987), and *Enmund* v. *Florida*, 458 U.S. 782 (1982). Those cases establish that a death sentence may not be imposed in the absence of a finding that the defendant was a sufficiently culpable participant in the killing. They do not, however, require the jury to make that finding during the guilt phase of a criminal trial. *Cabana* v. *Bullock*, 474 U.S. 376, 384, 392 (1986). Thus, Nebraska remains free to assign to the sentencing body the task of making the finding required by *Tison* and *Enmund*, and can legitimately conclude that non-capital homicide offenses are not lesser-included offenses of felony murder because felony murder requires no showing of a mental state with respect to the taking of life.

ARGUMENT

THE OMISSION OF JURY INSTRUCTIONS ON NON-CAPITAL OFFENSES THAT WERE NOT CHARGED AND THAT, UNDER APPLICABLE LAW, ARE NOT LESSER-INCLUDED OFFENSES OF THE CAPITAL CRIMES AT ISSUE DOES NOT VIOLATE *BECK* v. *ALABAMA*

The court of appeals held that this Court's decision in *Beck* v. *Alabama*, 447 U.S. 625 (1980), requires that a jury in a capital case be given the option to find the defendant guilty of non-capital offenses even where those offenses were not charged and, under applicable law, are not lesser-included offenses of any charged offense. That holding is an unprecedented and unwarranted expansion of *Beck*.

A. *Beck* Is Limited To Lesser-Included-Offense Instructions That Are Otherwise Appropriate Under Applicable Law

1. In *Beck*, the defendant was charged with the capital crime of robbery-intentional killing. 447 U.S. at 627. His defense was that he had participated in the robbery, but had not intended the death of the victim. *Id.* at 629-630. In light of that defense, the defendant would have been entitled, under general principles of Alabama law, to a lesser-included-offense instruction on felony murder. *Id.* at 630. The trial court nevertheless refused to instruct the jury on felony murder, relying on an Alabama statute, "unique in American criminal law," that precluded trial judges from instructing the jury on lesser-included offenses in a capital case. *Id.* at 628 & n.3, 630, 635.

Because Alabama law required the jury to impose a death sentence if it found Beck guilty of robbery-intentional killing, the jury in Beck's case was confronted with an all-or-nothing choice: "either convicting [Beck] of the capital crime, in which case it [would be] required to impose the death penalty, or acquitting him, thus allowing him to escape all penalties for his alleged participation in the crime." 447 U.S. at 629. This Court held that Alabama's statute violated the Constitution. *Id.* at 627. The Court explained that, "when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense—but leaves some doubt with respect to an element that would justify conviction of a capital offense—the failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction." *Id.* at 637. That risk, the Court held, "cannot be tolerated in a case in which the defendant's

life is at stake." *Ibid.* Thus, the Court concluded, "Alabama is constitutionally prohibited from withdrawing th[e] option [of finding the defendant guilty on a lesser-included offense] from the jury in a capital case." *Id.* at 638.[6]

The Court's holding in *Beck* was narrow: it violated the Constitution for Alabama to withdraw from the jury in a capital case the option, which otherwise would have existed under Alabama law, of finding the defendant guilty of a lesser-included offense that was supported by the evidence. 447 U.S. at 627, 630 & n.5, 637. Nowhere in *Beck* did the Court suggest that the Constitution requires trial judges to instruct juries in capital cases on offenses that are not lesser-included offenses under applicable law. Moreover, this Court's subsequent cases establish that *Beck* cannot properly be read to impose such an obligation.

2. This Court has addressed *Beck* claims in three subsequent cases: *Hopper* v. *Evans*, 456 U.S. 605 (1982); *Spaziano* v. *Florida*, 468 U.S. 447, 454-457 (1984); and *Schad* v. *Arizona*, 501 U.S. 624, 645-648 (1991). In each case, the Court rejected efforts to extend the holding of *Beck*. Examination of the three

---

[6] The defendant in *Beck* had relied on "both the Eighth Amendment as made applicable to the States by the Fourteenth Amendment and the Due Process Clause of the Fourteenth Amendment." 447 U.S. at 632. Although it did not specify the precise constitutional source for the right it identified, the Court in *Beck* did limit its holding to capital cases. See, *e.g.*, *id.* at 638 (Alabama's withdrawal of a lesser-included-offense instruction was "constitutionally prohibited * * * in a capital case"); *id.* at 638 n.14 (leaving open question "whether the Due Process Clause would require the giving of [lesser-included-offense] instructions in a noncapital case").

cases demonstrates that the trial court in this case acted constitutionally when it declined to instruct the jury on offenses that had not been charged and that are not lesser-included offenses of felony murder under Nebraska law.

a. In *Hopper*, the defendant was charged in Alabama state court with robbery-intentional killing. 456 U.S. at 607. He took the stand at trial, admitted that he had shot the victim in the back during the robbery, and asked the jury to return a guilty verdict. *Id.* at 607-608. He was convicted and sentenced to death. *Id.* at 608. The defendant subsequently sought habeas corpus relief in federal court, pursuant to 28 U.S.C. 2254, arguing *inter alia* that his conviction and sentence were invalid because he had been convicted under a statute that prohibited the jury from considering any lesser-included offenses in a capital case. *Id.* at 608-609. This Court rejected that claim.

The Court pointed out that its holding in *Beck* was expressly limited to cases in which the evidence would reasonably have supported a verdict on the lesser-included offense. 456 U.S. at 610. Where the evidence does not reasonably support a verdict on the lesser-included offense rather than the capital offense, the Court explained, giving the jury the option of arbitrarily convicting on the lesser-included offense makes capital proceedings more rather than less unreliable. *Id.* at 610-611. The Court then looked to Alabama law to determine whether the evidence in the case reasonably supported the giving of a lesser-included-offense instruction. *Id.* at 611-613.[7] The

[7] Under general principles of Alabama law, a lesser-included-offense instruction should be given if "there is any reasonable theory from the evidence which would support the position" that the defendant committed the lesser-included offense rather than the greater. 456 U.S. at 611-612 (quoting *Fulghum* v. *State*, 277 So. 2d 886, 890 (Ala. 1973)). The rule followed in the federal courts is that a lesser-included-offense instruction should be given "if the evidence would permit a jury rationally to find [a defendant] guilty of the lesser offense and acquit him of the greater." *Id.* at 612 (quoting *Keeble* v. *United States*, 412 U.S. 205, 208 (1973)). The Court remarked in *Hopper* that "[t]he Alabama rule clearly does not offend federal constitutional standards." *Ibid.*

defendant argued that the jury could reasonably have found him guilty of non-capital felony murder, which did not require proof of intent to kill. *Id.* at 612. The Court rejected that argument, because the evidence in the case—including the defendant's admission that he intentionally shot the victim in the back during a robbery—"affirmatively negated any claim that [the defendant] did not intend to kill the victim." *Id.* at 613. Thus, the Court concluded, "[a]n instruction on the offense of unintentional killing during this robbery was therefore not warranted" under Alabama law, and the failure to give such an instruction did not violate the Constitution. *Ibid.*[8]

[8] The court of appeals in the present case did not discuss the question whether the evidence would have permitted a reasonable jury to acquit respondent of felony murder but convict him of second-degree murder or manslaughter. As to second-degree murder, the answer to that question is plainly "no." Under Nebraska law, second-degree murder requires proof of an intent to kill. Neb. Rev. Stat. § 28-304(1) (1995). Respondent's defense was that he was so intoxicated that he either was insane or lacked the ability to form the intent to commit the predicate offense of first-degree sexual assault. No rational jury could rely on that defense to acquit respondent of felony-murder while at the same time finding respondent guilty of second-degree murder. Thus, under *Hopper*, the jury

b. The Court next considered a *Beck* claim in *Spaziano* v. *Florida*, 468 U.S. at 454-457. In *Spaziano*, the defendant was charged with first-degree murder. *Id.* at 450. At the close of the evidence, the trial court offered to instruct the jury on the non-capital lesser-included offenses of attempted first-degree murder, second-degree murder, third-degree murder, and manslaughter. *Ibid.* The trial court was

---

should not have been instructed as to second-degree murder. See *State* v. *Huebner*, 513 N.W.2d 284, 292-293 (Neb. 1994) (jury should not be instructed as to lesser-included offense unless "the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense").

At the time of the offenses in this case, manslaughter required proof that the defendant caused the death either intentionally but without malice, as upon a sudden quarrel, or unintentionally while in the commission of an unlawful act. Neb. Rev. Stat. § 28-305(1) (1995); *State* v. *Pettit*, 445 N.W.2d 890, 905 (Neb. 1989) (manslaughter upon sudden quarrel requires proof of intent to kill); but cf. *State* v. *Jones*, 515 N.W.2d 654, 658-659 (Neb. 1994) (overruling *Pettit* and holding that manslaughter upon sudden quarrel does not require proof of intent to kill). The first type of manslaughter—killing that is intentional but without malice—could not properly have been submitted to the jury in this case, for the same reason that second-degree murder could not properly have been. An instruction as to the second type of manslaughter—unlawful-act manslaughter—would have been supported by the evidence only if a jury could reasonably have found that—although respondent was too intoxicated to form the intent to commit first-degree sexual assault, and thus should be acquitted of felony murder—he was not too intoxicated to form the intent necessary to commit some other unlawful act, and therefore should be convicted of "unlawful act" manslaughter because he unintentionally caused his victims' death while committing that unlawful act. Respondent did not identify any such unlawful act in the trial court, nor has he since.

willing to do so, however, only if the defendant would waive his statute-of-limitations defense to those charges. *Ibid.* The defendant refused to waive the defense, and the trial court accordingly refused to instruct on any lesser-included offenses. *Ibid.* The defendant was convicted of first-degree murder, and was sentenced to death. *Id.* at 451-452. After extensive state-court proceedings, this Court granted the defendant's petition for a writ of certiorari, to consider *inter alia* the defendant's claim that the trial court's refusal to instruct the jury as to any lesser-included offenses violated the requirements of *Beck*. *Id.* at 453-454.

The Court rejected the defendant's claim. It explained that its concern in *Beck* was "to eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence." 468 U.S. at 455. "Requiring that the jury be instructed on lesser included offenses for which the defendant may not be convicted, however, would simply introduce another type of distortion into the factfinding process. * * * *Beck* does not require that the jury be tricked into believing that it has a choice of crimes for which to find the defendant guilty, if in reality there is no choice." *Id.* at 455-456. Thus, the Court concluded, "[w]here no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the process. *Beck* does not require that result." *Id.* at 455.[9]

---

[9] The Court went on to indicate the view that a defendant would be entitled under *Beck* to choose either to waive a statute-of-limitations defense and insist on the giving of lesser-included-offense instructions or to assert the statute-of-

c. The Court most recently addressed the scope of *Beck* in *Schad* v. *Arizona*, 501 U.S. at 645-648. In *Schad*, the defendant was charged with a single count of first-degree murder. *Id.* at 628 (opinion of Souter, J.). Under Arizona law, first-degree murder is a single offense that includes both premeditated murder and felony murder. *Ibid.* The defendant's defense was that "the circumstantial evidence proved at most that [the defendant] was a thief, not a murderer." *Id.* at 629 (opinion of Souter, J.). The defendant asked that the jury be instructed on the lesser-included offense of theft, but the trial court refused. *Ibid.* The jury was instructed, however, on the non-capital lesser-included offense of second-degree murder. *Id.* at 646.[10] The defendant was convicted of first-degree murder, and was sentenced to death by the trial judge after a separate hearing. *Id.* at 629 (opinion of Souter, J.). The defendant challenged his conviction and sentence, arguing *inter alia* that the trial court had violated

---

limitations defense and forfeit the right to such instructions. 468 U.S. at 456; see also *id.* at 467 (White, J., concurring in part and concurring in the judgment) (characterizing the Court's discussion of the point as dictum). Because the defendant in *Spaziano* had knowingly chosen to assert his statute-of-limitations defense, the Court concluded, "it was not error for the trial judge to refuse to instruct the jury on the lesser included offenses." *Id.* at 457.

[10] As is explained below, see note 15, *infra*, second-degree murder is not a lesser-included offense of felony murder under Nebraska law. In *Schad*, however, the State was proceeding against the defendant in a single count charging both premeditated murder and felony murder. 501 U.S. at 628 (opinion of Souter, J.). Under Arizona law, second-degree murder apparently is treated as a lesser-included offense of premeditated murder but not felony murder. *Id.* at 660 (White, J., dissenting).

the requirements of *Beck* by refusing to instruct the jury as to the lesser-included offense of robbery. *Id.* at 645.[11] Specifically, the defendant argued that *Beck* required that the jury be instructed on *all* non-capital lesser-included offenses that were supported by the evidence. *Id.* at 646. This Court disagreed. *Id.* at 646-648.

The Court pointed out that, unlike the jury in *Beck*, the jury in *Schad* had not faced an all-or-nothing choice between capital murder and acquittal, because it had been instructed on the non-capital lesser-included offense of second-degree murder. 501 U.S. at 646-647. The Court rejected the argument that an instruction on robbery was also required in order to permit the jury to render a verdict consistent with one reasonable view of the evidence, *i.e.*, that, although the defendant had participated in the robbery, he had been completely uninvolved in the victim's murder. *Id.* at 647. As the Court explained, the reliability of the jury's first-degree murder conviction was not undermined by the absence of a lesser-included-offense instruction on robbery:

> To accept the [contrary] contention * * *, we would have to assume that a jury unconvinced that petitioner was guilty of either capital or

---

[11] Apparently, the defendant in *Schad* requested at trial a lesser-included-offense instruction only as to theft, while on appeal he contended that a robbery instruction should have been given. 501 U.S. at 629-630 (opinion of Souter, J.). In this Court, the defendant claimed that instructions should have been given as to both offenses. *Id.* at 645. Based on a concession by the State, this Court treated the request for a robbery instruction as having been properly preserved, and did not reach the question whether the request for a theft instruction had been properly preserved. *Id.* at 645 n.10.

> second-degree murder, but loath to acquit him completely (because it was convinced he was guilty of robbery), might choose capital murder rather than second-degree murder as its means of keeping him off the streets. Because we can see no basis to assume such irrationality, we are satisfied that the second-degree murder instruction in this case sufficed to ensure the verdict's reliability.

Id. at 647-648. The Court further explained that it was not holding that the requirements of *Beck* would invariably be satisfied by the submission of any lesser-included offense, even if the lesser-included offense was not supported by the evidence. *Id.* at 648. Because it was undisputed, however, that the lesser-included offense instructed to the jury in *Schad* was supported by the evidence, the Court concluded that the requirements of *Beck* had been met. *Ibid.*[12]

---

[12] The dissent in *Schad* took the view that *Beck* required that the jury be given a lesser-included-offense instruction as to each of the prosecution's theories of guilt. 501 U.S. at 661-662 (White, J., dissenting). Because the second-degree murder instruction was a lesser-included offense only as to the State's premeditated-murder theory, and because the jury was not given a lesser-included-offense instruction that applied to the State's felony-murder theory, the dissent would have reversed. *Ibid.* The dissent noted but rejected Arizona's claim that an instruction on robbery would not have been appropriate because robbery was not a lesser-included offense of felony murder under Arizona law. *Id.* at 660-662. The dissent acknowledged that "[i]t is true that the rule in *Beck* only applies if there is in fact a lesser included offense to that with which the defendant is charged." *Id.* at 661. It further acknowledged that "deference is due state legislatures and courts in defining crimes." *Ibid.* In the view of the dissent, however, the required deference had "constitutional limits," and did not extend to the case of felony murder-robbery and the predicate robbery, because "the underlying crime must, as a matter of law, be a lesser included offense of the greater." *Id.* at 661-662. The dissent supported that conclusion by pointing out that, under the test used in the federal courts for determining which offenses are "necessarily included" within the meaning of Federal Rule of Criminal Procedure 31(c), predicate felonies are lesser-included offenses of felony murder. *Id.* at 661 n.6 (citing *Schmuck* v. *United States*, 489 U.S. 705 (1989)).

3. The court of appeals in this case held that *Beck* requires that the jury in a capital case be instructed on at least one non-capital homicide offense supported by the evidence, even if the capital charge lacks any lesser-included homicide offenses under the law of the jurisdiction. Pet. App. 14-15.[13] That holding is erroneous.

---

[13] The court of appeals appeared to require that, at least in this case, the State could not "bar an instruction on noncapital homicide." Pet. App. 13. The court of appeals did not discuss whether a non-capital offense other than homicide would satisfy *Beck*, and it suggested that, under Nebraska law, felony murder has no lesser-included offenses. *Id.* at 8. Although there is language to that effect in some Nebraska cases, see, *e.g.*, *State* v. *Price*, 562 N.W.2d 340, 346 (Neb. 1997), that language appears to refer to lesser-included homicide offenses, because it is clear under Nebraska law that the predicate felony is a lesser-included offense of felony murder. See *State* v. *Nissen*, 560 N.W.2d 157, 178-179 (Neb. 1997) (burglary is lesser-included offense of felony murder/burglary). Respondent in this case did not request that the jury be instructed as to the predicate felony of first-degree sexual assault, which is a lesser-included offense of felony murder under Nebraska law. Of course, an instruction as to first-degree sexual assault would not have been supported by the evidence in this case, because no rational jury could have acquitted respondent of felony murder but convicted him of sexual assault. See note 8, *supra*. On the other hand, the same appears to be true of the offenses

Beck and the cases applying it do not establish a *per se* rule that the jury in a capital case can never be confronted with an all-or-nothing choice between finding the defendant guilty of a capital charge or acquitting. Rather, they establish a much narrower proposition: a State may not erect "artificial" barriers that restrict the jury to an all-or-nothing choice between a capital offense and acquittal. *California* v. *Ramos*, 463 U.S. 992, 1007 (1983). Thus, the Court upheld the defendant's conviction in *Hopper*, even though the jury had confronted an all-or-nothing choice between conviction on a capital count and acquittal, because the State was entitled to enforce its rule that lesser-included-offense instructions should not be given unless the evidence reasonably supported the conclusion that the defendant was guilty of the lesser-included offense but not guilty of the greater offense. 456 U.S. at 610-612. Similarly, the Court upheld the defendant's conviction in *Spaziano*, even though the jury had confronted an all-or-nothing choice between conviction on a capital count and acquittal, because the State was entitled to insist that the defendant waive his statute-of-limitations defense if he wished to have the jury instructed on lesser-included offenses. 468 U.S. at 454-457.

Similar considerations dictate that respondent's convictions and sentences should be upheld. This, unlike *Beck*, is not a case in which the State artificially reduced the options available to juries in capital cases alone.[14] Rather, the State simply enforced its

---

as to which respondent did request that the jury be instructed. See *ibid.*

[14] Nebraska's capital-sentencing procedures are quite different from the procedures followed in Alabama at the time *Beck* was decided. In *Beck*, the jury was told that, if it entered a guilty verdict, it would be required to impose a death sentence. 447 U.S. at 639 n.15. The Court in *Beck* concluded that such knowledge undermined the reliability of the jury's determination of guilt. *Id.* at 639-643. In Nebraska, by contrast, the jury plays no role in imposition of sentence. Neb. Rev. Stat. § 29-2520 (1995). One of the concerns that animated the decision in *Beck*, therefore, is not implicated in the present case.

long-standing rule of substantive law—applicable in capital and non-capital cases alike—that second-degree murder and manslaughter are not lesser-included offenses of felony murder. See, *e.g.*, *State* v. *Price*, 562 N.W.2d 340, 346 (Neb. 1997); *Thompson* v. *State*, 184 N.W. 68 (Neb. 1921) (reversing manslaughter conviction because defendant had been charged by information with felony murder, and manslaughter was not properly submitted to jury as lesser-included offense of felony murder); *Morgan* v. *State*, 71 N.W. 788, 794 (Neb. 1897).[15] As the federal courts had con-

---

[15] To determine whether one offense is a lesser-included offense of another, the Nebraska courts generally apply an "elements" test essentially identical to that applied in the federal courts. See *State* v. *Williams*, 503 N.W.2d 561, 565 (Neb. 1993) (overruling 1990 decision that had adopted "cognate-evidence" test and returning to elements test that court had previously followed); *Schmuck* v. *United States*, 489 U.S. at 716. Under that test, the elements of the two offenses are compared, and, if proof of one offense necessarily establishes proof of the other, the latter offense is a lesser-included offense of the former. Applying the elements test, second-degree murder is clearly not a lesser-included offense of felony murder under Nebraska law, because a defendant who is guilty of felony murder will not necessarily have the intent to kill that is required to establish guilt of second-degree murder. The same is true as to manslaughter premised on an intentional killing without malice. See note 8, *supra*.

sistently held before the decision of the court of appeals in this case, it does not offend *Beck* for a trial court to refuse the request of a capital defendant that the jury be instructed on an uncharged offense which, under applicable law, is not a lesser-included offense of any charged offense.[16]

Under Nebraska law, manslaughter can also be committed by causing death "while in the commission of an unlawful act." Neb. Rev. Stat. § 28-305(1) (1995). Applying an elements test, that form of manslaughter could be viewed as a lesser-included offense of felony murder, because a defendant who committed felony murder necessarily would have caused death while in the commission of an unlawful act. The Nebraska courts do not appear to have specifically discussed "unlawful act" manslaughter when explaining the basis for the long-standing rule that manslaughter is not a lesser-included offense of felony murder. Whatever its basis, the rule that manslaughter is not a lesser-included offense of felony murder has been well settled in Nebraska for more than a century. There is no reason to conclude that Nebraska's approach to that question "offend[s] federal constitutional standards." *Hopper* v. *Evans*, 456 U.S. at 612. In any event, the evidence in this case would not have supported an instruction on "unlawful act" manslaughter. See note 8, *supra*.

[16] See, *e.g.*, *Greenawalt* v. *Stewart*, 105 F.3d 1268, 1276 (9th Cir.) (trial court's refusal to instruct jury on second-degree murder did not violate requirements of *Beck*, because, under Arizona law, second-degree murder was not lesser-included offense of felony murder), cert. denied, 117 S. Ct. 794 (1997); *Greenawalt* v. *Ricketts*, 943 F.2d 1020, 1029 (9th Cir. 1991) (same), cert. denied, 506 U.S. 888 (1992); *Hill* v. *Kemp*, 833 F.2d 927, 929 (11th Cir. 1987) (under Georgia law, statutory rape is not lesser-included offense of forcible rape; therefore, even assuming that the requirements of *Beck* extend to non-capital cases, refusal to instruct as to statutory rape was not constitutional error); *Woratzeck* v. *Ricketts*, 820 F.2d 1450, 1457 (9th Cir. 1987) (because, under Arizona law, second-degree murder is not lesser-included offense of felony murder, trial

B. Any Requirement That The Jury Be Instructed On Offenses That Are Not Lesser-Included Offenses Under Applicable Law Would Be Unworkable

In addition to being unprecedented, the rule adopted by the court of appeals would give rise to serious practical problems. As has been noted, Nebraska courts, like their federal counterparts, generally apply an "elements" test to determine whether an uncharged offense may properly be submitted to the jury as a lesser-included offense. See note 15, *supra*. A rule that the Constitution requires state and federal courts to instruct juries on uncharged non-capital

---

court's refusal to instruct as to second-degree murder did not violate requirements of *Beck*; "The constitutional protection prohibits the state from withdrawing [the lesser included offense] option from the jury in a capital case. As there was no option to withdraw, [the defendant] was not denied due process.") (internal quotation marks and citation omitted), cert. granted, vacated, and remanded on other grounds, 486 U.S. 1051 (1988); *Jones* v. *Thigpen*, 741 F.2d 805, 816 (5th Cir. 1984) ("*Beck* can be read only to require instruction in capital cases on lesser included offenses available under state law. Mississippi defines no lesser included offense that might have applied to this robbery-killing, and the trial court in this case was therefore not bound by *Beck* to deliver a lesser included offense instruction.") (citation omitted), cert. granted, vacated, and remanded on other grounds, 475 U.S. 1003 (1986); cf. *Hatch* v. *Oklahoma*, 58 F.3d 1447, 1454 (10th Cir. 1995) (affirming capital sentence even though trial court refused to instruct jury as to non-capital offense, because one requested offense was not supported by evidence, and other was not lesser-included offense under Oklahoma law; "We do not read *Beck* or any other case as establishing a constitutional requirement that states create a noncapital murder offense for every set of facts under which a murder may be committed."), cert. denied, 116 S. Ct. 1881 (1996).

offenses that have elements different from those of the charged offense—lesser-*un*included offenses—would generate a daunting array of difficult issues.[17]

First, it is entirely unclear what relationship would have to exist between the charged capital offense and the other offense that the defendant wished to have the jury consider. For example, there was evidence in the present case suggesting that respondent committed a variety of lesser offenses in addition to second-degree murder and manslaughter: burglary, assault, indecent exposure, public intoxication, and possession of peyote. A similarly lengthy list could be drawn up in most capital cases. The court of appeals does not identify, and logic does not immediately suggest, the principles that should govern a court's determination as to which such offenses that are not lesser-included offenses under generally applicable state law a defendant could insist that the jury consider as an alternative to capital murder charges.[18]

---

[17] The supposed obligation to instruct on lesser-unincluded offenses could arise in two contexts. First, a charged capital offense might lack any lesser-included offenses under applicable law. Second, even if the charged capital offense had lesser-included offenses, an instruction as to those lesser-included offenses might not be supported by the evidence, while an instruction as to one or more lesser-*un*included offenses might be. In the latter context, the rule adopted by the court of appeals would apparently require that the jury be instructed on at least one lesser-unincluded offense that was supported by the evidence.

[18] Defendants do not have a right under *Beck* to have the jury instructed as to all lesser-included—or, under the approach of the court of appeals in this case, lesser-unincluded—offenses. Rather, it suffices if one lesser-included offense supported by the evidence is submitted to the jury. *Schad*, 501 U.S. at 645-648. In addition, under *Hopper*, a defendant could not insist that the jury be instructed as to an offense if the evidence would not permit a reasonable jury to find the defendant guilty of that offense while at the same time acquitting on the capital murder count. 456 U.S. at 610-612. In the present case, the latter principle would rule out some of the listed offenses—*e.g.*, burglary (which requires proof of unlawful intent, see Neb. Rev. Stat. § 28-507 (1995)), see note 8, *supra*—but not others, *e.g.*, possession of peyote. It is wholly unclear how a trial court would decide which of the remaining lesser-unincluded offenses should be submitted to the jury.

In two recent cases, the Court has noted the difficulties created by rules—other than an elements test—for determining the requisite degree of relationship between offenses. See *United States* v. *Dixon*, 509 U.S. 688, 711-712 & n.16 (1993) (overruling earlier case applying "same conduct" test to determine whether subsequent criminal prosecution is barred by Double Jeopardy Clause; unlike "same elements" test, "same conduct" test produced confusion and was unworkable); *Schmuck* v. *United States*, 489 U.S. 705, 720-721 (1989) (rejecting "inherent relationship" test for determining when offense should be submitted to jury as lesser-included offense; "inherent relationship" test is "rife with the potential for confusion," while the "elements" test "promotes judicial economy by providing a clearer rule of decision"). One highly undesirable consequence of the rule adopted by the court of appeals in this case is that the federal courts would be required once again to attempt to develop a test, other than the elements test, for determining when an uncharged lesser-unincluded offense was sufficiently related to a charged capital offense as to make it constitutionally obligatory to submit the uncharged offense to the jury. Moreover,

federal courts addressing claims under 28 U.S.C. 2254 would be required to apply that test to a wide array of state statutes.

Second, submission of uncharged lesser-unincluded offenses would—barring waiver—violate the rights of the defendant. *Schmuck*, 489 U.S. at 717-718 (noting that submission of such offenses, without waiver, may violate defendant's right to indictment and right to notice).[19] Arguably, the defendant could waive those rights, *ibid.*; cf. *Spaziano*, 468 U.S. at 456, but the question then arises whether the defendant is free to waive those rights selectively, only as to the offense or offenses that he wishes for his tactical reasons to have submitted to the jury, or whether, conversely, the defendant could be required to waive his right to notice and indictment as to all appropriate lesser offenses. Either approach would present difficulties.[20]

Third, granting defendants the right to have uncharged and unincluded offenses submitted to the jury would raise concerns about unfair surprise. In Nebraska, as in the federal system, the contents of jury instructions are often not resolved until the trial is almost over. Neb. Rev. Stat. § 29-2016(5) (1995) (requests for jury instructions shall be made after evidence is concluded); Fed. R. Crim. P. 30 (requests for instructions are to be made at close of

---

[19] In Nebraska, felony cases may be prosecuted either by indictment or by information. Neb. Rev. Stat. § 29-1601 (1995). In the federal system, felony cases must be prosecuted by indictment. U.S. Const. Amend. V; Fed. R. Crim. P. 7(a).

[20] On the one hand, it would hardly seem fair to permit a defendant to pick and choose among the array of lesser-unincluded offenses solely on the basis of his tactical interests. On the other hand, it would be no fairer to permit the prosecution to do the same.

evidence or at such earlier time during trial as court directs; court shall rule on requests before closing arguments). That does not create problems when the issue is the propriety of instructing the jury as to lesser-included offenses. Because such offenses are necessarily established by proof of the charged offense, the parties will have been focusing their respective efforts on proving or raising doubts as to the elements of the lesser-included offenses. See *Schmuck*, 489 U.S. at 718, 720.

The same will not be true as to lesser offenses with new elements. Such offenses introduce distinct issues into a trial, and neither party would have any way to anticipate that it needed to address those issues during the evidentiary phase of the proceedings. See *Schmuck*, 489 U.S. at 720 (rejecting "inherent relationship" test for identifying lesser-included offenses, because that test would not "permit[] both sides to know in advance what jury instructions will be available and to plan their trial strategies accordingly").

C. The Court Of Appeals' Reasoning Is Unsound

1. The court of appeals believed that it was justified in overriding Nebraska law on lesser-included offenses because *Beck* itself had invalidated a state law. Pet. App. 9, 11 & n.11. That reasoning is incorrect. *Beck* held that a State may not single out a capital crime and deny the giving of a lesser-included-offense instruction where the defendant would otherwise be entitled to such an instruction under general principles of state law. As the Court explained in *Beck*, Alabama gave defendants the right to a lesser-included-offense instruction in all non-capital cases, 447 U.S. at 636-637, and the State conceded that,

under its general rule, Beck "would have been entitled to instructions on first-degree (felony) murder and robbery," *id.* at 630 n.5. *Beck* does not justify the conclusion that, even where generally applicable state law would bar the giving of a lesser-included-offense instruction, the Constitution requires state courts to devise procedures to instruct on some non-lesser-included offense. And, for the reasons discussed above, any extension of *Beck* to impose such a requirement would encounter serious obstacles.

2. The court of appeals also found support for its holding in this Court's decisions in *Tison* v. *Arizona*, 481 U.S. 137, 158 (1987) (death penalty could properly be imposed upon defendant convicted of felony murder, where defendant was major participant in predicate felony and acted with reckless indifference to human life), and *Enmund* v. *Florida*, 458 U.S. 782, 801 (1982) (death penalty could not be properly be imposed on defendant convicted of felony murder, where defendant was minor participant in predicate felony and lacked culpable mental state as to killing). Pet. App. 12-15. The court of appeals appeared to reason that, in order to comply with *Tison* and *Enmund*, the State will in any event have to make a showing about the mental state of the defendant with respect to the killings. Accordingly, the court concluded, the State cannot withhold from the jury instructions on other homicide offenses on the theory that those offenses inject a new issue into the case, *i.e.*, proof of a mental state relating to the killing. *Id.* at 13 ("To hold otherwise would mean that the State could avoid *Beck* by claiming that it need show no intent or reckless indifference with respect to the killing, yet could simultaneously avoid *Enmund* by adducing precisely such evidence.").

The court of appeals erred in its application of *Tison* and *Enmund*. This Court has made clear that *Tison* and *Enmund* do not affect the power of the States and the federal government to define the elements of capital offenses. *Cabana* v. *Bullock*, 474 U.S. 376, 385 (1986) ("[O]ur ruling in *Enmund* does not concern the guilt or innocence of the defendant—it establishes no new elements of the crime of murder that must be found by the jury."). To the contrary, although *Tison* and *Enmund* together define a substantive limitation on the circumstances in which a death sentence may be imposed, the limitation they define may properly be addressed at sentencing, or even thereafter. *Id.* at 392 (determination that defendant's conduct was sufficient to justify capital sentence may be made by "an appellate court, a trial judge, or a jury").

Tison and *Enmund* therefore do not undermine Nebraska's rationale for declining to treat second-degree murder and manslaughter as lesser-included offenses of felony murder. The fact that the State must ultimately meet the requirement imposed by *Tison* and *Enmund* does not support the conclusion that the jury in a capital case must be instructed on that requirement. Accordingly, *Tison* and *Enmund* are entirely consistent with the State's generally applicable rule that homicide charges such as second-degree murder are not lesser-included offenses of felony murder—in a capital prosecution or otherwise.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
ROY W. MCLEESE III
Assistant to the Solicitor General

NOVEMBER 1997

APPENDIX

Neb. Rev. Stat. § 28-303. Murder in the first degree; penalty.

A person commits murder in the first degree if he kills another person (1) purposely and with deliberate and premeditated malice, or (2) in the perpetration of or attempt to perpetrate any sexual assault in the first degree, arson, robbery, kidnapping, hijacking of any public or private means of transportation, or burglary, or (3) by administering poison or causing the same to be done; or if by willful and corrupt perjury or subornation of the same he purposely procures the conviction and execution of any innocent person. The determination of whether murder in the first degree shall be punished as a Class I or Class IA felony shall be made pursuant to sections 29-2520 to 29-2524.

Neb. Rev. Stat § 28-304. Murder in the second degree; penalty.

(1) A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation.

(2) Murder in the second degree is a Class IB felony.

Neb. Rev. Stat § 28-305. Manslaughter; penalty.

(1) A person commits manslaughter if he kills another without malice, either upon a sudden

quarrel, or causes the death of another unintentionally while in the commission of an unlawful act.

(2) Manslaughter is a Class III felony.

(U)

No. 96-1693

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

FRANK X. HOPKINS, WARDEN,
PETITIONER,

-vs-

RANDOLPH K. REEVES,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICI CURIAE STATES IN SUPPORT OF PETITIONER

GRANT WOODS
ATTORNEY GENERAL

PAUL J. McMURDIE
CHIEF COUNSEL
CRIMINAL APPEALS SECTION

JON G. ANDERSON
ASSISTANT ATTORNEY GENERAL
(COUNSEL OF RECORD)
1275 WEST WASHINGTON
PHOENIX, ARIZONA 85007-2997
TELEPHONE: (602) 542-4686

ATTORNEYS FOR AMICUS CURIAE
STATE OF ARIZONA

25 pp

DANIEL E. LUNGREN
Attorney General
State of California

M. JANE BRADY
Attorney General
State of Delaware

ALAN G. LANCE
Attorney General
State of Idaho

JAMES E. RYAN
Attorney General
State of Illinois

MIKE MOORE
Attorney General
State of Mississippi

JEREMIAH W. (JAY) NIXON
Attorney General
State of Missouri

JOSEPH P. MAZUREK
Attorney General
State of Montana

FRANKIE SUE DEL PAPA
Attorney General
State of Nevada

PHILIP T. McLAUGHLIN
Attorney General
State of New Hampshire

DENNIS C. VACCO
Attorney General
State of New York

MICHAEL F. EASLEY
Attorney General
State of North Carolina

BETTY D. MONTGOMERY
Attorney General
State of Ohio

W.A. DREW EDMONDSON
Attorney General
State of Oklahoma

MARK W. BARNETT
Attorney General
State of South Dakota

JOHN KNOX WALKUP
Attorney General
State of Tennessee

RICHARD CULLEN
Attorney General
Commonwealth of Virginia

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — PAGE

CONSTITUTION

RULES

OTHER AUTHORITIES

INTEREST OF THE AMICI CURIÆ

The Amici Curiæ States (Amici) respectfully submit this brief in support of the Petitioner, Frank Hopkins, Warden of the Nebraska State Prison. The Amici have a strong interest in not having federal courts declare and apply new rules of federal constitutional law on federal habeas review of state convictions. The Eighth Circuit's dramatic expansion of *Beck v. Alabama*, 447 U.S. 625 (1980), requiring the giving of lesser-related homicide offense instructions in a capital felony-murder prosecution, constitutes a new rule, whose application on habeas review violates *Teague v. Lane*, 489 U.S. 288 (1989) and drastically impacts the finality interests of the Amici. The Amici also have a fundamental interest in protecting their substantive criminal law against new federal mandates; expanding *Beck* to require the giving of instructions on lesser-related homicide offenses in capital felony-murder trials would be an unwarranted intrusion into the States' substantive criminal law. The Eighth Circuit rule would drastically, and detrimentally, impact state felony-murder prosecutions, hampering the States' ability to fully prosecute some of their most dangerous criminals.

SUMMARY OF ARGUMENT

The Eighth Circuit ruled in this case that the Nebraska trial court violated *Beck* by not giving lesser-related homicide offense instructions in a capital felony-murder case. First, this holding declares and applies a new rule on habeas review, in violation *Teague*. Second, *Beck* should not be expanded to require that state courts give lesser-related homicide offense instructions in capital felony-murder cases. Expanding the federal due-process mandate is an unwarranted intrusion into the substantive criminal law of the States—this Court has long recognized that state courts are the ultimate expositors of their state criminal law. *Medina v. California*, 505 U.S. 437 (1992); *Estelle v. McGuire*, 502 U.S. 62 (1991). For these reasons, this Court should reverse the Eighth Circuit's opinion in *Reeves v. Hopkins*, 102 F.3d 977 (8th Cir. 1996).

ARGUMENTS

I

THE EIGHTH CIRCUIT OPINION, REQUIRING THE GIVING OF LESSER-RELATED HOMICIDE OFFENSE INSTRUCTIONS IN A CAPITAL FELONY-MURDER TRIAL, DECLARES AND APPLIES A NEW RULE ON FEDERAL HABEAS REVIEW, IN VIOLATION OF *TEAGUE*.

Amici contend that the Eighth Circuit has created a new rule, and erroneously applied it on federal habeas review. The opinion dramatically expands *Beck* by requiring a state court conducting a capital felony-murder trial to give jury instructions on the *lesser-related* homicide offenses of second-degree murder and manslaughter, when those offenses are not *lesser-included* offenses of felony-murder under state law. Not only is this new rule not mandated by *Beck*, it is contrary to this Court's more recent opinions explaining the limited scope of *Beck*.

A. THIS COURT MUST DO A *TEAGUE* ANALYSIS FIRST.

Amici submit that this Court must first analyze the *Teague* issue before considering the merits.[1] That issue has been squarely presented to this Court, which granted review on Petitioner's third question—whether *Teague* applies to bar application of the rule set forth by the Eighth Circuit. The application of *Teague* "is a threshold question in a federal habeas case." *Goeke v. Branch*, 514 U.S. ___, 115 S. Ct. 1275, 1276 (1995). In this case, *Teague* "is a necessary predicate to the resolution of the [other] question[s] presented in the petition." *Caspari v. Bohlen*, 510 U.S. ___, 114 S. Ct. 948, 953 (1994). "[I]f the State does argue that the defendant seeks the benefit of a new rule of constitutional law, the court *must* apply *Teague* before considering the merits of the claim." *Id.* (emphasis in original) (this Court considered *Teague* issue despite Eighth Circuit's insistence, as here, that it was merely applying existing precedent).

---

1. *Teague* applies in capital cases. *Penry v. Lynaugh*, 492 U.S. 302, 313-14 (1989).

B. THE EIGHTH CIRCUIT HAS CREATED A NEW RULE.

Second, *Teague* clearly bars application of the proposed new rule to this case. A new rule is announced for *Teague* purposes when "the result was not dictated by precedent existing at the time the defendant's conviction became final." *Caspari*, 114 S. Ct. at 953 (quoting *Teague*, 489 U.S. at 301) (emphasis deleted). The *Teague* doctrine ensures respect for the finality of state convictions and to minimize the costs to the States of having to continually relitigate convictions and sentences:

> "[S]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands."

Teague, 489 U.S. at 308–10 (quoting *Engle v. Issac*, 456 U.S. 107, 128 n.33 (1982)); *see also Lockhart v. Fretwell*, 506 U.S. 364, 372–73 (1993) (*Teague* "new rule" doctrine inapplicable to decisions favoring State because States' interests in comity and finality are not diminished by applying a favorable "new rule"); *Butler v. McKellar*, 494 U.S. 407, 414 (1990) ("new rule" principle validates "reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions").

Because Respondent came to the federal courts on collateral habeas review, he may not obtain federal relief "unless it can be said that a state court, at the time the conviction or sentence became final, would have acted objectively unreasonably by not extending the relief later sought in federal court." *O'Dell v. Netherland*, 117 S. Ct. 1969, 1973 (1997); *see also Lambrix v. Singletary*, 117 S. Ct. 1517, 1525 (1997) (the issue is whether the unlawfulness of the prisoner's conviction was apparent to "all reasonable jurists"). Habeas relief is proper only if a state court considering the prisoner's claim at the time the conviction became final would have felt *compelled* by existing precedent to conclude that the rule sought was required by the Constitution. *Gray v. Netherland*, 116 S. Ct. 2074, 2083 (1996); *Saffle v. Parks*, 494 U.S. 484, 488 (1990).

The *Teague* analysis looks at three factors: (1) when the prisoner's conviction became final; (2) whether the "legal landscape" that existed when the conviction became final was such that the state court would have

felt compelled to conclude that the prisoner's rule was mandated by the Constitution; and (3) if not compelled (meaning that the rule is a "new rule"), whether the new rule falls within one of the two exceptions to the *Teague* doctrine. *O'Dell*, 117 S. Ct. at 1973.

The first point is easily settled. Respondent's conviction became final in 1984. *See State v. Reeves*, 344 N.W.2d 433, *cert. denied*, 469 U.S. 1028 (1984).

Second, this Court must look at the legal landscape that existed back in 1984. Amici submit that there was no authority in 1984 that would have compelled a state court to adopt the rule now proclaimed by the Eighth Circuit. The relevant authority that existed in 1984 was *Beck* (issued in 1980), and *Hopper v. Evans*, 456 U.S. 605 (1982).

In *Beck*, this Court considered an Alabama statute that precluded the trial court from instructing the jurors on any lesser-included offenses once the State elected to *charge* capital murder. *Beck* emphasized that the circumstances of that case were *sui generis*:

> Alabama's failure to afford capital defendants the protection provided by lesser included offense instructions is *unique* in American criminal law.

447 U.S. at 635 (emphasis added). The precise holding was:

> [A] sentence of death [may not] constitutionally be imposed after a jury verdict of guilt in a capital case, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict.

447 U.S. at 627.

It is worth noting that *Beck*, in discussing the law of states (other than Alabama) that permit the giving of lesser-included offense instructions in appropriate circumstances, cited *State v. Valencia*, 589 P.2d 434 (1979). 447 U.S. at 636 n.12. *Valencia* was an Arizona capital-murder case, charged as felony-murder, in which the trial court's refusal to give a second-degree murder instruction was affirmed because the evidence

showed that the killing occurred in the course of one of the felonies enumerated in the murder statute, and, under state law, there were no lesser-included offenses of felony murder.[2] 589 P.2d at 441.

Thus, *Beck* contains no indication whatsoever that states would violate the Due Process Clause by not giving *lesser-related* homicide offense instructions in felony-murder cases. *Beck* simply addressed the peculiar situation of a state statute forbidding, in capital cases only, any *lesser-included* offense instructions, when such lesser-included offenses existed under state law.

In *Hopper v. Evans*, this Court simply held that the Alabama statute considered in *Beck* had not deprived the defendant of a fair trial when a lesser-included offense instruction was not warranted by the evidence. 456 U.S. at 612–14. It held that "a *lesser included* offense instruction [need] be given *only* when the evidence warrants such an instruction." 456 U.S. at 611 (emphasis in original).

Thus, both *Beck* and *Hopper* were concerned with an extraordinary statute; no other state had a similar statute. Neither opinion says *anything* about state trial courts being required to give *lesser-related* homicide offense instructions (when there are none under state law) in felony-murder prosecutions; they discuss only *lesser-included* offense instructions based on lesser-included homicide offenses that were recognized by Alabama law. Therefore, in 1984, there was no constitutional mandate from this Court to follow the rule set forth by the Eighth Circuit. In other words, a jurist considering all the relevant authority in 1984 could reasonably have reached a conclusion contrary to the Eighth Circuit's rule.

Indeed, the Ninth Circuit, in *Greenawalt v. Ricketts*, 943 F.2d 1020, 1029 (9th Cir. 1991), *cert. denied*, 506 U.S. 888 (1992), specifically rejected the proposed rule.[3] *See also Hill v. Kemp*, 833 F.2d 927, 929

---

2. The Arizona Supreme Court, in *State v. Greenawalt*, 624 P.2d 828, 846, *cert. denied*, 454 U.S. 882 (1981), subsequently quoted that portion of *Valencia*, and held that second-degree murder instructions were not required in a felony-murder case.

3. After the Eighth Circuit issued its opinion, the Ninth Circuit was again presented with the issue in *Greenawalt v. Stewart*, 105 F.3d 1268 (9th Cir.), *cert. denied*, 117 S. Ct. 794 (1997), when Greenawalt urged the court to recall its mandate because of *Reeves*. The Ninth Circuit declined to recall the mandate, stating "*Reeves* does not persuade

(11th Cir. 1987) (defendant was convicted of murder and forcible rape, no error in not instructing jurors on statutory rape in view of Georgia Supreme Court holding that statutory rape is not a lesser-included offense of forcible rape—a federal court must follow a state court's decision on whether a defendant could be convicted of a lesser-included offense in deciding whether the failure to give a lesser-included offense instruction violates due process); *United States v. Beckford*, 966 F. Supp. 1415, 1432–33 (E.D. Va. 1997) (holding that *Beck* did not require Congress to create any lesser-included homicide offenses to federal crime of intentional murder in furtherance of a continuing criminal enterprise—"*Reeves* is not persuasive"). That a result is not so obvious that a court would have felt compelled to reach it can be demonstrated by a split between the federal circuit courts. *See Butler*, 494 U.S. at 415.

Furthermore, opinions from this Court after 1984 certainly indicate that a reasonable jurist, in 1984, would not have thought the Eighth Circuit rule was mandated by *Beck*. The most important case to understanding the scope of *Beck* is *Spaziano v. Florida*, 468 U.S. 447, 455 (1984), in which, *under Florida law*, the charge of first-degree murder included the lesser charges of attempted first-degree murder, second-degree murder, third-degree murder, and manslaughter. 468 U.S. at 450. However, the statute of limitations had run on those offenses and the defendant refused to waive the statute to obtain the instructions, so the trial court instructed the jurors only on first-degree murder. *Id.* Spaziano argued to this Court that *Beck* required that the lesser-included offense instructions be given, without his having to waive the statute of limitations. This Court rejected the argument:

> Petitioner would have us divorce the *Beck* rule from the reasoning on which it was based. The element the Court in *Beck* found essential to a fair trial was not simply a lesser included offense instruction in the abstract, but the enhanced rationality and reliability the existence of the instruction introduced into the jury's deliberations. *Where no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the process. Beck does not require that result.*

---

us that we erroneously resolved Greenawalt's *Beck* claim." 105 F.3d at 1276.

468 U.S. at 455 (emphasis added). This Court added:

> Requiring that the jury be instructed on lesser included offenses for which the defendant may not be convicted, however, would simply introduce another type of distortion into the factfinding process.

468 U.S. at 455–56. It cautioned that *Beck* does not require the trial court to "trick" the jury by giving instructions on lesser included-offenses on which no conviction could actually occur. 468 U.S. at 456.

Spaziano raises two points important to this case. First, it emphasizes that when a federal court considers whether due process requires giving lesser-included offense instructions, the availability of lesser-included offenses is determined by state law. If no lesser-included offenses are available under state law, *Beck* does not require instructions on them, even though it leaves the jurors with no options other than capital conviction or acquittal. In *Spaziano*, there were no available lesser-included homicide offenses under Florida law because the statute of limitations had run; in this case, there were no available lesser-included homicide offenses under Nebraska law because second-degree murder and manslaughter are not lesser-included offenses of felony-murder. Second, *Spaziano* again shows that *Beck* is only concerned with the availability of *lesser-included* offenses, as opposed to *lesser-related* offenses. *Beck* does not require States that have no lesser-included homicide offenses under state law to change their law to require instruction on lesser-related homicide offenses.

The only other opinion in which this Court has considered the constitutional necessity of lesser-included offense instructions was *Schad v. Arizona*, 501 U.S. 624 (1991). In that case, the state charged the defendant with first-degree murder, and proceeded on both premeditated and felony-murder (the underlying felony was robbery) theories. The trial court instructed the jurors on first-degree murder and second-degree murder[4], but refused to instruct the jurors on robbery, which the defendant

4. The jurors were instructed on second-degree murder because it is a lesser-included offense of first-degree, premeditated murder. *See State v. Whittle*, 752 P.2d 489, 493 (Ct. App. 1985), *approved as modified on other grounds*, 752 P.2d 494 (1988). Second-degree murder is not a lesser-included offense when the first-degree murder charged is based solely on a felony-murder theory. *State v. Martinez-Villareal*, 702 P.2d 670, 675–76, *cert. denied*, 474 U.S. 975 (1985). Under Arizona law, the jurors are to be given

characterized as a lesser-included offense of a felony-murder theory based on a robbery. 501 U.S. at 645. Schad argued to this Court that the due process principles underlying *Beck* required that a jury in a capital case be instructed "on *every* lesser included noncapital offense supported by the evidence, and that robbery was such an offense in this case." *Id.* (emphasis added.) This Court found no *Beck* violation because the jurors were instructed on second-degree murder, and held that *Beck* does not require instruction on all lesser-included offenses. 501 U.S. at 646–48.

Thus, *Schad* appears to further limit *Beck* to its unusual factual situation. Once again, it discusses *Beck* only in the context of lesser-included offenses. In this case, by contrast, the Eighth Circuit's opinion did not turn on giving instructions on *lesser-included offenses*; it had no dispute with the principle of state law that second-degree murder and manslaughter are not lesser-included offenses of felony-murder under Nebraska law. *Schad* also makes clear that the Eighth Circuit, at the very least, erred in holding that *Beck* required the Nebraska trial court to instruct on both second-degree murder *and* manslaughter. *Schad* in no way indicates that *Beck* requires the result reached by the Eighth Circuit in this case.[5]

Accordingly, reading *Spaziano* and *Schad* together, a reasonable jurist deciding this case in 1984 would not have felt compelled by *Beck* to hold that state courts are required to give lesser-related homicide offense instructions in capital felony-murder cases, when there are no lesser-included homicide offenses to felony-murder under state law. Thus, the

verdict forms on all offenses "necessarily included in the offense charged." Rule 23.3, Ariz. R. Crim. P. They are not to be instructed on lesser-related offenses, which have been defined as "offenses supported by the facts of the case, although not included in the charging document." *State v. West*, 862 P.2d 192, 203–04 (1993), *cert. denied*, 511 U.S. 1063 (1994).

5. Admittedly, *Schad* did not consider the issue here, whether lesser-related homicide offense instructions have to be given when there are no lesser-related homicide offenses under state law. The dissent took the position that due process required the giving of an instruction on the underlying felony, robbery. 501 U.S. at 661. However, even the dissent recognized "[i]t is true that the rule in *Beck* only applies *if there is in fact a lesser included offense to that with which the defendant is charged, for 'where no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the process.'*" 501 U.S. at 661 (White, J. dissenting) (emphasis added). Thus, even assuming *arguendo* that the dissent's position was correct, Respondent was entitled only to an instruction on the underlying felony, but he did not request an instruction on that offense. (Petition at 18.)

Eighth Circuit has not followed the mandate of *Beck*, but rather created an entirely new constitutional mandate. Hence, despite its stated reliance on *Beck*, the Eighth Circuit has announced and applied a "new rule" on habeas review, in violation of *Teague*.

C. NEITHER OF THE TWO *TEAGUE* EXCEPTIONS APPLY.

Finally, neither of the two *Teague* exceptions apply to the Eighth Circuit's new rule. *Teague* sets forth only two exceptional situations in which a new rule may be applied retroactively in a habeas proceeding:

> Under the first exception, "a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe'." This exception is clearly inapplicable. The proscribed conduct in the instant case is capital murder, the prosecution of which is, to put it mildly, not prohibited by the rule in [*Reeves*]. Nor did [*Reeves*] address any "categorical guarantees accorded by the Constitution" such as a prohibition on the imposition of a particular punishment on a certain class of offenders.

Butler, 494 U.S. at 415 (discussing retroactivity of new rule stated in *Arizona v. Roberson*, 486 U.S. 675 (1988) (citations omitted). The first *Teague* exception obviously does not apply here—the state's proscription of murder is not altered.

"The second *Teague* exception applies to new 'watershed rules of criminal procedure' that are necessary to the fundamental fairness of the criminal proceeding." *Sawyer v. Smith*, 497 U.S. 227, 241–42 (1990). Although *Beck* sought to enhance the reliability of capital proceedings, which is presumably the intention of the Eighth Circuit's extension of *Beck* in this case, this Court pointed out in *Sawyer* that, "A rule that qualifies under this exception must not only improve accuracy, but also 'alter our understanding of the *bedrock procedural elements*' essential to the fairness of a proceeding." *Id.* at 242 (emphasis in original). Indeed, at least one federal circuit court has held that *Beck* itself is not a watershed rule. *Andrews v. DeLand*, 943 F.2d 1162 (10th Cir. 1991), *cert. denied*, 503 U.S. 967 (1992).

A fortiori, the Eighth Circuit rule expanding *Beck* does not "alter our understanding of bedrock procedural elements." First, this Court has never held lesser-included offense instructions are constitutionally required in non-capital cases. *Beck*, 447 U.S. at 638 n.14. Second, the giving of lesser-included offense instructions arose as an aid to, and often is considered more beneficial to, the prosecution. *Beck*, 447 U. S. at 633; *Spaziano*, 468 U.S. at 456. Third, this Court in *Spaziano* found no contradiction in *Beck* to the "general premise that a criminal defendant may not be required to waive a substantive right as a condition for receiving an otherwise constitutionally fair trial" in holding that Spaziano was properly required to elect between waiving his statute of limitations defense and receiving lesser-included offense instructions in his capital case. 468 U.S. at 455–57.

Accordingly, no "bedrock procedural element essential to the fairness of a proceeding" is contained in the Eighth Circuit's newly-minted rule. Therefore, the Eighth Circuit's attempted expansion of *Beck* does not fall within either of the two *Teague* exceptions, and there is no persuasive reason why *Teague* should not be applied to bar application of a new rule to this case.

II

TO REQUIRE THE GIVING OF LESSER-RELATED HOMICIDE OFFENSE INSTRUCTIONS IN CAPITAL FELONY-MURDER PROSECUTIONS WOULD BE AN UNWARRANTED INTRUSION INTO THE STATES' SUBSTANTIVE CRIMINAL LAW.

The Eighth Circuit has declared that the Due Process Clause of the Fourthteenth Amendment mandates that lesser-related homicide offense instructions be given in all capital-felony murder prosecutions, when the evidence supports the lesser-related offenses. This newly-created mandate flies in the face of the fact that the overwhelming majority of states have adopted the rule that juries are to be instructed only on lesser-included offenses, not lesser-related offenses. This new constitutional mandate is an unprecedented intrusion into state substantive criminal law, and especially into capital felony-murder prosecutions. *Beck* does not warrant this massive intervention, which will unduly "federalize" the States' substantive criminal law.

A. STATE COURTS AND LEGISLATURES ARE THE ULTIMATE EXPOSITORS OF STATE LAW.

First, it is important to recount this Court's pronouncement that:

> [P]reventing and dealing with crime is much more the business of the States than it is of the Federal Government [citation omitted], and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States.

Patterson v. New York, 432 U.S. 197, 201 (1977). *Accord, Medina v. California*, 505 U.S. 437, 445 (1992); *Martin v. Ohio*, 480 U.S. 228, 232 (1987). The States have considerable expertise in matters of criminal procedure, and their criminal justice systems are grounded in centuries of common-law tradition. *Medina*, 505 U.S. at 445. As this Court stated in *Spencer v. Texas*, 385 U.S. 554, 564 (1967):

> [I]t has never been thought that [decisions under the Due Process Clause] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure.

Accord, Estelle v. McGuire, 502 U.S. 62, 70 (1991); *Marshall v. Lonberger*, 459 U.S. 422, 438, n. 6 (1983); *see also Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) ("declining to reexamine the state rule that intentional or criminally reckless killings are aspects of the single crime of felonious homicide"). In *Powell v. Texas*, 392 U.S. 514, 535–36 (1968), this Court stated that it "has never articulated a general constitutional doctrine of *mens rea*," explaining:

> The doctrines of *actus reus, mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.

392 U.S. at 536. *Schad*, 501 U.S. at 636, states, "it is a fundamental principle that we are not free to substitute our own interpretations of state statutes for those of a State's courts." (citing *Mullaney v. Wilbur*).

B. THE EIGHTH CIRCUIT HAS ABANDONED THE UNIVERSALLY-ACCEPTED LESSER-INCLUDED OFFENSE DOCTRINE AND MANDATED THE LESSER-RELATED OFFENSE DOCTRINE, A DOCTRINE THAT HAS BEEN ALMOST UNIFORMLY REJECTED BY THE STATE COURTS.

The Eighth Circuit, without explicitly recognizing the impact of its decision, has held that due process, at least in capital cases, requires the giving of lesser-related homicide offense instructions when there are no lesser-included homicide offenses as a matter of state law. This appears to be the first time that a federal court has mandated that states follow the lesser-related offense doctrine, which is substantially different from the well-established lesser-included offense doctrine.

The lesser-included offense doctrine was developed at early common law and has been universally accepted in this country. *See Schmuck v. United States*, 489 U.S. 705, 717 n.9 (1989); *Beck*, 447 U.S. 625, 633–37 (1980); *see generally*, James A. Shellenberger and James A. Strazzella, *The Lesser Included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies*, 79 MARQUETTE L. REV. 1, 6 (1995) (hereinafter Shellenberger and Strazzella). Under this doctrine, the trial judge must instruct the jurors on all charged offenses and all lesser-included offenses that are supported by the evidence. Shellenberger and Strazzella, at 6. In deciding what lesser-included offense instructions must be given, the trial court determines what offenses are lesser-included offenses of the charged crime by looking at the elements of the offenses, and then determines if the evidence presented at trial supports those lesser-included offenses. *Schmuck*, 489 U.S. at 718–19.

By contrast, only a handful of States have accepted the lesser-related offense doctrine; the great majority have flatly rejected it.[6] The lesser-

---

6. The States rejecting the lesser-related offense doctrine are: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington, and West Virginia. *See*

related offense doctrine requires instruction on offenses "bearing a recognizable relationship to the charged offense and punishable to a lesser degree." Annotation, *Lesser-Related State Offense Instructions: Modern Status*, 50 A.L.R. 4th 1081, 1087 n.3 (1986)

C. A CONSTITUTIONALLY-MANDATED LESSER-RELATED OFFENSE DOCTRINE WOULD UNDULY INTERFERE WITH THE PROVINCE OF THE STATES AND WOULD BE UNWORKABLE.

For a state criminal procedure to be proscribed by the Due Process Clause, it must "offend some principle of justice so rooted in the traditions and conscience of our people to be ranked as fundamental." *Patterson*, 432 U.S. at 202. The state laws proscribing the giving of lesser-related offense instructions do not offend fundamental principles, and therefore may not be cast aside under the guise of due process.

As discussed above, the lesser-included offense doctrine has been universally accepted by the States. Nevertheless, with the limited exception set forth in *Beck*, this Court has never made the lesser-included offense doctrine a federal constitutional mandate.[7] If it did, it would "open up significant federal court interference in state court proceedings," because lesser-included offense instructions are, to some extent, an issue in every criminal trial. Shellenberger and Strazzella, at 111. For obvious reasons, this Court has declined to take this dramatic step.

The Eighth Circuit has mandated a completely new constitutional requirement by mandating lesser-related offense instructions. This Court has never adopted the lesser-related offense doctrine as any sort of constitutional mandate. Indeed, with respect to federal prosecutions, this Court has mandated use of the "elements" test under the lesser-included offense doctrine. *Schmuck*, 489 U.S. at 716. The Eighth Circuit's opinion requires sober consideration of its new mandate's effect on the States.

---

generally Annotation, *Lesser-Related State Offense Instructions: Modern Status*, 50 A.L.R. 4th 1081, 1096–1106 (1986). The States apparently following the lesser-related offense doctrine are California, Michigan, Nevada (in non-capital murder cases only, open question if applicable in capital murder cases), New Jersey, and Utah. *Id.* at 1114–1116.

7. One circuit, the Third Circuit has held that *Beck* requires giving of lesser-included offense instructions in non-capital cases. *Vujosevic v. Rafferty*, 844 F.2d 1023, 1026–27 (3d Cir. 1988) (in non-capital murder case, trial judge erred by not instructing jurors on aggravated assault).

One question is whether the lesser-related offense requirement would be limited to capital cases. Indeed, most federal circuits have declined to extend *Beck* beyond capital cases, but the Third Circuit has done so. *See Vujosevic*, 844 F.3d at 1026 (holding that trial court violated due process by not giving aggravated assault instruction in non-capital murder case). If the lesser-related offense doctrine is allowed to establish a foothold in due process jurisprudence, other courts will no doubt expand its application to non-capital situations, thereby further invading the province of state substantive criminal law.

Even if limited to capital cases, the lesser-related offense doctrine will require substantial changes in state law, and federal interpretations of state law. As discussed above, all States are familiar with the lesser-included offense doctrine. Therefore, by constitutionally mandating lesser-related offense instructions, the Eighth Circuit is forcing upon the great majority of states a concept previously unknown in their criminal law. Moreover, if the new rule is adopted, federal courts will be in the business of telling state courts how to do a lesser-related offense analysis (something federal courts do not do in federal prosecutions[8]), and deciding what offenses are lesser-related offenses of charged crimes. This project would be challenging for state courts intimately familiar with their own criminal codes; it would be nearly impossible for federal courts much less familiar with state criminal codes. Furthermore, unlike the fairly mechanical "elements" test for lesser-included offenses, the test for lesser-related offenses verges on the mystical. The extent of such a widespread intrusion into state criminal law would be breathtaking.

Even if the federal courts were willing to undertake this broad intrusion into state law, Amici submit that the lesser-related test is patently unworkable. There is an eerie feeling that we have come this way before. For many years, this Court's double-jeopardy analysis consisted of the "identical elements" standard adopted in *Blockburger v. United States*, 284 U.S. 299, 304 (1932). The *Blockburger* elements test "inquires whether each offense contains an element not contained in the other;" where each offense contains an element not contained in the other, they are not the "same offense," and the Double Jeopardy Clause provides no bar to

---

8. As noted previously, this Court held in *Shmuck* that federal courts are not required to give lesser-related offense instructions in federal cases, under Rule 31(c), Federal Rules of Criminal Procedure. 489 U.S. at 716.

multiple punishments or successive prosecutions. *United States v. Dixon*, 509 U.S. ___, 113 S. Ct. 2849, 2856 (1993). However, in *Grady v. Corbin*, 495 U.S. 508, 510 (1990), this Court expanded the analysis to include, not only actions for offenses containing the same elements (the *Blockburger* test), but also actions for offenses involving the same *conduct*. A mere 3 years after *Grady* was issued, the proven impracticality of the expanded analysis persuaded this Court to abandon the *Grady* test and return to the *Blockburger* test. *Dixon*, 113 S. Ct. at 2856. Amici submit that the Eighth Circuit's lesser-related offense analysis, which abandons the familiar and well-established elements test of the lesser-included offense doctrine (similar to the *Blockburger* elements test), would be at least as untenable as the *Grady* rule proved to be.

D. THE OPINION CASTS DOUBT ON THE VIABILITY OF CAPITAL FELONY-MURDER PROSECUTIONS.

Another problem with the Eighth Circuit's opinion is the doubt it casts on the viability of state capital felony-murder prosecutions. The Eighth Circuit opinion, while purporting to be a straightforward application of *Beck*, also casts a chill on the States' seeking the death penalty in felony-murder prosecutions. The opinion attempts to reassure the State of Nebraska (and other States) that "There is nothing necessarily unconstitutional with the State's definition of the mental culpability required for a felony murder conviction." 102 F.3d at 984. It later states, "We do not suggest that the State may not impose the death penalty pursuant to a felony murder conviction." 102 F.3d at 984. The opinion "doth protest too much." These statements will have a chilling effect on the States' use of the felony-murder theory in capital cases. The only way state prosecutors can avoid the quandary of when and what lesser-related offense instructions need to be given is by not seeking the death penalty in felony-murder cases. As the Eighth Circuit states, "Nebraska's rationale for prohibiting lesser included offense instructions disappears when the defendant is sentenced to death." 102 F.3d at 984. In other words, the Eighth Circuit is advising state prosecutors that they can avoid the new constitutional mandate by not seeking the death-penalty in felony-murder prosecutions.

The felony-murder rule is a long-accepted and widely-adopted principle in the States' substantive criminal law. As Justice Scalia stated in his concurring opinion in *Schad*, the felony-murder theory has been around

"since at least the early 16th century." 501 U.S. at 648. His opinion also noted that a 1794 Pennsylvania felony-murder statute had "been widely copied, and down to the present time the United States and most states have a single crime of first-degree murder that can be committed by killing in the course of a robbery as well as premeditated killing." 501 U.S. at 649.[9]

As discussed above, although proclaiming no inherent unconstitutionality in prosecutions under the felony-murder theory, the Eighth Circuit opinion raises practical concerns about such cases that may deter state prosecutors from such prosecutions. The opinion assures Nebraska that lesser-related offenses need only be given when they are supported by the evidence. 102 F.3d at 985. The initial problem for the trial court will be, as discussed previously, what offenses are "lesser-related offenses." Having solved that puzzle, the trial judge will have to divine whether there is sufficient evidence to support a conviction on those lesser-related offenses. The practical effect will be that the trial judge, not wanting to be reversed on appeal and required to try the case again, will err on the side of giving second-degree murder or manslaughter instructions, even if sufficiency of the evidence on those charges is questionable. Thus, state prosecutors will be exposed to the risk that the jurors will find the defendant guilty on a charge that is not supported by the evidence.

Hopefully, in the face of arguments that there is no evidence to support the lesser-related charges, the jurors will not find the defendant guilty on them, but there is always a possibility that the jurors will compromise on the verdict, despite the evidence. This, despite the Eighth Circuit's pronouncement that *Spaziano* stands for the "eminently sound notion" that "juries should not be mislead [sic] into 'convicting someone of a charge for which he or she cannot be convicted'." 102 F.3d at 984.

After trial, the defendant will no doubt file a post-trial motion for a judgment of acquittal because there is no evidence to support the conviction, *and*, if the jurors have in fact compromised to reach a verdict

---

9. Moreover, before a sentence of death can be imposed in a felony-murder case, an *Enmund/Tison* finding must be made. *See Tison v. Arizona*, 481 U.S. 137 (1987); *Enmund v. Florida*, 458 U.S. 782 (1982).

that is not supported by the evidence, the defendant *will be entitled to an acquittal*. If no post-trial motion is filed, or the judge denies the motion, the defendant will argue on appeal that there is no evidence to support the conviction. Once again, he will be right and the appellate court will vacate the conviction because there is *no evidence to support it*. *See also State v. Handley*, 585 S.W.2d 458, 463 (Mo. 1979) (conviction for second-degree murder reversed for insufficiency of the evidence lack of jurisdiction—state charged first-degree murder, so trial court had no jurisdiction under the Missouri constitution to submit the crime of second-degree murder to the jurors because second-degree murder is not a lesser-included offense of first-degree felony-murder under Missouri law), *overruled*, *State v. Wilkerson*, 616 S.W.2d 829, 833 (Mo. banc 1981). Thus, in such compromise-verdict situations, the ultimate result will be that the defendant will be completely absolved of any homicide offense, *despite the uncontested fact that he or she participated in murdering someone*. *See Handley*, 585 S.W.2d at 465 ("[W]e reverse the judgment and order that the defendant be discharged").

Because the felony-murder theory has been so well-accepted and widely-adopted in American jurisdictions, to allow the Eighth Circuit's intrusion into state felony-murder prosecutions would be an unprecedented intrusion into the homicide laws of the States—putting at risk their ability to prosecute some of the most dangerous persons in their jurisdictions.[10]

---

10. For instance, Arizona has long relied upon the felony-murder theory in capital prosecutions, in conjunction with the principle that there are no lesser-included or lesser-related homicide instructions that need be given in such prosecutions. The Ninth Circuit has declined to interfere with Arizona's substantive criminal law under the guise of *Beck*:

> Greenawalt contends that the trial court erred by failing to instruct the jury on second degree murder or any lesser included offense. He correctly observes that due process requires such an instruction when the evidence warrants it. *Beck v. Alabama*, 447 U.S. 625, 636–37, 100 S. Ct. 2382, 2389, 65 L. Ed. 2d 392 (1980). He fails to point out the Supreme Court's subsequent clarification that "[w]here no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the process. *Beck* does not require that result." *Spaziano v. Florida*, 468 U.S. 447, 455, 104 S. Ct. 3154, 3159, 82 L. Ed. 2d 340 (1984). Greenawalt was tried solely for felony murder, a crime for which Arizona law recognizes no lesser included offense. *Greenawalt I*, 624 P.2d at 846. . . . Here, the trial court committed no error.

Greenawalt, 943 F.2d at 1029.

E. *BECK* DOES NOT SUPPORT THIS INTRUSION INTO STATE SUBSTANTIVE CRIMINAL LAW.

Amici submit that *Beck* does not support the substantial intrusion into state law discussed above. Amici recognize that the Due Process Clause places certain limits on the States' ability to define the elements of a crime.[11] Amici, however, submit that the Due Process Clause does not give federal courts *carte blanche* to fundamentally alter the *mens rea* concept embodied in the felony-murder doctrine and the concept of lesser-included homicide offenses. *See Powell*, 392 U.S. at 535–36. The Eighth Circuit has held that Nebraska's substantive-law choice in felony-murder prosecutions —not allowing second-degree murder and manslaughter instructions that will divert the jurors from the appropriate *mens rea* considerations—is unconstitutional under *Beck*.

The ultimate question is whether *Beck* forbids States from enacting capital offenses that contain no lesser-included homicide offenses. Amici submit that *Beck* does not mean, and this Court has never construed it to mean, that a state legislature may only create capital offenses that contain lesser-included homicide offenses. *See Beckford*, 966 F. Supp. at 1430. This Court's opinions construing *Beck*, discussed earlier in this brief, have demonstrated a tendency to restrict, rather than to extend, *Beck*. *Id.* The rationale of *Spaziano* reflects the reluctance of this Court to extend *Beck* to cases in which lesser-included offenses do not exist. 966 F. Supp. at 1433. One court has nicely summed up the distinction between *Beck* and cases such as this one:

---

11. While it is true that *Beck*, in a limited manner, rewrote Alabama substantive law based on the Due Process Clause, that intrusion had limited effect on the laws of other states because the Alabama procedure at issue was "unique in American criminal law." 447 U.S. at 635. Moreover, the Alabama statute at issue was essentially flawed in a second respect, it had many of the same *mandatory death-penalty flaws that this Court found* unconstitutional in *Woodson v. North Carolina*, 428 U.S. 280 (1976). *Beck*, 447 U.S. at 639.

By contrast, the constitutionality of felony-murder statutes has never been questioned by this Court, and felony-murder has widely been adopted as one theory of capital prosecution. Thus, the Eighth Circuit's pronouncements impinge upon criminal justice in a great number of states.

> [I]n *Beck*, the defendant sought a rule, pursuant to which, defendants may not be precluded from benefitting from an instruction on an offense which had either been created by the legislature or which existed under state law. Here, however, the defendants seek a rule, pursuant to which, the judiciary would circumscribe legislative discretion in the *creation of offenses* by requiring the legislature to create alternatives for conviction.

966 F. Supp. at 1433. That same court stated, "[T]here is no warrant in the Constitution, a document which rests of principles of federalism, for requiring that, once Congress chooses to exert jurisdiction over the most serious capital offenses with a federal nexus, it must exert jurisdiction over all other lesser included offenses." *Id.*

In view of the principles of comity and federalism that have led to federal-court deference to the States in matters of state substantive criminal law, there is no constitutional warrant requiring that state legislatures provide for lesser-included homicide offenses when they enact felony-murder statutes. The creation of state criminal laws, and the elements of those laws, is one of the most basic state functions. *Beck* neither mandates that state legislatures provide for lesser-included homicide offenses when enacting felony-murder statutes, nor that federal courts manufacture lesser-related homicide offenses for felony-murder.

CONCLUSION

The judgment of the Eighth Circuit Court of Appeals should be reversed.

Respectfully submitted,

GRANT WOODS
Attorney General
State of Arizona

PAUL J. McMURDIE
Chief Counsel
Criminal Appeals Section

JON G. ANDERSON
Assistant Attorney General
(Counsel of Record)

Attorneys for Amicus Curiae
State of Arizona

AMICUS CURIAE

BRIEF

(1)

No. 96-1693

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

FRANK X. HOPKINS, Warden,

Petitioner,

v.

RANDOLPH K. REEVES,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT'S BRIEF ON THE MERITS

Helen C. Trainor*
150 W. Flagler Street
Suite 1500
Miami, FL 33130
(305) 536-6900 ext. 208
*Counsel of Record

David Porter, Co-Chair
NACDL *Amicus* Committee
Renaissance Tower
801 K Street
Sacramento, CA 95814
(916) 498-5700

45 pp

QUESTIONS PRESENTED FOR REVIEW

I.

MAY A FEDERAL COURT REQUIRE A STATE COURT, IN A FIRST-DEGREE MURDER CASE BEING PROSECUTED UNDER A TRADITIONAL FELONY MURDER THEORY, TO IGNORE STATE SUBSTANTIVE LAW AND INSTRUCT ITS GUILT PHASE JURIES ON LESSER HOMICIDE OFFENSES THAT HAVE NEVER BEEN RECOGNIZED AS LESSER INCLUDED OFFENSES OF FIRST-DEGREE FELONY MURDER, IN ORDER TO SATISFY THIS COURT'S RULING IN *BECK v. ALABAMA*?

II.

DOES THE OPINION OF THE EIGHTH CIRCUIT IN *REEVES v. HOPKINS*, 102 F.3d 977 (8th CIR. 1996) CREATE A DIRECT CONFLICT WITH THE NINTH CIRCUIT IN *GREENAWALT v. RICKETTS*, 943 F.2d 1020 (9th CIR. 1991)?

III.

IS THE RULE ANNOUNCED BY THE EIGHTH CIRCUIT A "NEW" RULE UNDER *TEAGUE v. LANE*, 489 U.S. 288 (1989)?

INTERESTED PARTIES

Other than the parties named in the caption of the case, the following are also interested parties:

States' Attorneys General as *Amicus Curiae*

United States as *Amicus Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

OTHER AUTHORITIES:

CONSTITUTIONAL PROVISIONS

STATUTES AND RULES

OTHER AUTHORITIES

In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

FRANK X. HOPKINS, Warden
Nebraska State Penitentiary

***Petitioner*,**

v.

RANDOLPH K. REEVES,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT'S BRIEF ON THE MERITS

INTEREST OF AMICUS CURIAE[1]

[1]*Amicus*, in compliance with S.Ct.R. 37.2(a), has filed letters from petitioner and respondent consenting to its submission of this brief on behalf of the respondent. In compliance with S.Ct. R. 37.6, no person other than *amicus* made a monetary contribution to the preparation or submission of the brief. Further, the brief was not written in whole or in part by counsel for a party.

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a nationwide, nonprofit voluntary association of criminal defense lawyers founded in 1958. NACDL is affiliated with 68 state and local criminal defense organizations and works cooperatively with them on issues related to criminal defense. Thus, NACDL speaks for more than 28,000 criminal defense lawyers nationwide.

NACDL seeks to promote the fair administration of criminal justice through adherence to the Bill of Rights. If generally seeks to improve the quality of the American system of justice.

The interest of *amicus* in this case is two-fold. First, *amicus* is concerned that issues in capital cases be exhaustively researched and briefed because death is indeed different. Second, this Court has asked the parties to address the weighty issue of the respective powers of the states and federal government to define the elements of capital cases. *Amicus* believes that this issue is not presented by the case under review and should not be decided.

SUMMARY OF ARGUMENT

The principal question presented by the petition implies that the lower court's ruling is an unwise and unjustifiable extension of this Court's holding in *Beck v. Alabama*. In fact, this case is on all fours with *Beck*. Both cases are based on the Eighth Amendment principle that when a defendant is clearly guilty of some serious, violent crime, state law cannot prohibit giving the jury instructions on lesser included offenses. A jury verdict is inherently unreliable when it rests on an all-or-nothing choice between convicting such a defendants of a capital crime or not convicting him at all. This unreliability is unacceptable in cases where the ultimate penalty is imposed, whether the state law prohibiting the instruction is based on statute, as in *Beck*, or on state court rulings, as in this case. Thus, the lower court's ruling is a straight-forward application of *Beck*; it does not require federal courts to "ignore state substative law," nor does it implicate a due process right to lesser-included instructions.

Thus, once *Beck* is understood to govern the issue in this case, there is no split between the Eighth and Ninth Circuits. There is, rather, confusion as to whether *Spaziano v. Florida*, 468 U.S. 447 (1984), is an extension of *Beck* or an exception. This confusion may be resolved by a mere clarification that *Beck's* theoretical basis is the Eighth Amendment which looks to the ***effect*** of state laws on the deliberative process in capital cases and not to any of a variety of potential ***causes*** of irrational decision making.

The Eighth Circuit therefore created no "new" rule under *Teague v. Lane*, 489 U.S. 288 (1989), since it merely applied *Beck*. Even if *Reeves* could be understood as superimposing a new federal procedural requirement on state law, the state waived any *Teague* bar by failing to raise it in the district court. Moreover, this Court has never held that *Teague* applies where a purportedly new rule is announced during the regular course of habeas review where the "new" rule would otherwise constitute binding precedent.

ARGUMENT

I.

MAY A FEDERAL COURT REQUIRE A STATE COURT, IN A FIRST-DEGREE MURDER CASE BEING PROSECUTED UNDER A TRADITIONAL FELONY MURDER THEORY, TO IGNORE STATE SUBSTANTIVE LAW AND INSTRUCT ITS GUILT PHASE JURIES ON LESSER HOMICIDE OFFENSES THAT HAVE NEVER BEEN RECOGNIZED AS LESSER INCLUDED OFFENSES OF FIRST-DEGREE FELONY MURDER, IN ORDER TO SATISFY THIS COURT'S RULING IN *BECK v. ALABAMA*?

A. This case presents no issue requiring an extension of *Beck v. Alabama*.[2] Rather, the Eighth Circuit's holding in *Reeves v. Hopkins* should be affirmed because it correctly understands that the gravamen of *Beck* is limited to the Eighth Amendment's concern with the reliability of a jury verdict in capital cases, and not any due process right to lesser included instructions. Nor does *Reeves* even address a state's prerogative to

---

[2]*Beck v. Alabama*, 447 U.S. 625 (1980).

determine its own criminal law.

In *Beck v. Alabama*, 447 U.S. 625 (1979), this Court recognized that in cases in which the death penalty has been imposed, the Eighth Amendment requires invalidation of state rules that operate to diminish the reliability of the guilt determination: " [W]hen the defendant is guilty of a serious, violent offense--but leaves some doubt with respect to an element that would justify conviction of a capital offense--the failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction". *Id.* at 637, *citing Gardner v. Florida*, 430 U.S. 349, 357-58 (1977). In capital cases, the concern with consistency and reliability of the decision making process has always been the province of the Eighth Amendment. *See, e.g., Clemons v. Mississippi*, 494 U.S. 738 (1990); *Furman v. Georgia*, 409 U.S. 902 (1972).

At issue in *Beck* was an Alabama death statute that prohibited a trial judge from giving the jury the option of convicting a defendant of a lesser included, non-capital offense. This Court reasoned that a jury verdict was inherently unreliable when it resulted from an all-or-nothing choice between convicting a defendant of the capital crime or convicting him of no crime, where the evidence clearly established guilt of *some* serious, violent crime, was inherently unreliable. *Id.* at 637. This Court did *not* hold that the Alabama statute prohibiting instructions on lesser included offenses was unconstitutional; nor did it hold that states were required to enact new statutes or craft new common law lesser included offenses where none had existed

in order to satisfy some new due process entitlement. Rather, this Court targeted *convictions* resulting from capital prosecutions based on a single theory of guilt where all other theories of guilt supported by the evidence were *per se* proscribed. "...[I]f the unavailability of a lesser included offense instruction enhances the risk of an unwarranted *conviction*, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case". *Id.* at 638 (emphasis added).

Beck's concern that convictions in capital cases be reliable predicted the result in *Spaziano v. Florida*, 468 U.S. 447 (1984), in which this Court both reaffirmed that "*Beck* made clear that in a capital trial a lesser included offense instruction is a necessary element of a constitutionally fair trial", *id.* at 455, and held that a guilty verdict in a capital case would necessarily be unreliable if the trial judge misled the jury as to state law.

This Court to date has held neither that a capital defendant is constitutionally entitled to lesser included instructions-- thus requiring states to revise any offending law-- nor that states cannot enact statutes which would permit imposition of the death penalty without also permitting a guilt-phase jury to consider lesser included non-capital offenses. Nor does this case require this Court to address the issue posed by this Court to the parties in this case, thus extending *Beck*, because the prohibition in Nebraska case law operated to present the jury with precisely the same all-or-nothing dilemma in this case as was presented in *Beck*. *See Reeves v. Hopkins*, 102 F.3d 977 (8th Cir. 1996)("The

unacceptable constitutional dilemma was that state law *prohibited* instructions on noncapital murder charges in cases where conviction made the defendant death-eligible")(emphasis in original). *Indeed, the State in its brief before this Court urges this Court to restrict its analysis in this case to Eighth Amendment capital jurisprudence. See* Pet. Br. at 33-34.[3]

---

[3]The courts of appeals are split as to whether *Beck* recognizes an Eighth Amendment right to the most reliable possible verdict or a due process right to instruction on lesser included offenses. *Compare Wingerfall v. Jones*, 918 F.2d 1544 (11th Cir. 1990)(due process violated by trial court's failure to instruct on lesser included offense) *with Bagby v. Sowders*, 894 F.2d 792 (6th Cir. 1990)(holding that *Beck* is grounded in Eighth Amendment concerns, not due process). This theoretical ambiguity was presaged by Fifth, Eighth and Ninth Circuit law which, even before *Beck* was decided, had held that federal courts have no habeas jurisdiction to review refusals to instruct on lesser included offenses in non-capital cases. *See Bonner v. Anderson*, 517 F.2d 135, 136 (5th Cir. 1975); *Cooper v. Campbell*, 597 F.2d 628 (8th Cir. 1979); *James v. Rease*, 546 F.2d 325 (9th Cir. 1976). Since *Beck*, however, the Third, Sixth and Seventh Circuits have held that federal courts do have jurisdiction under the due process clause to review state lesser included instruction refusals. *See Bishop v. Mazukiewicz*, 634 F.2d 724 (3d Cir. 1980); *Brewer v. Overberg*, 624 F.2d 51 (6th Cir. 1980); *Davis v. Greer*, 675 F.2d 141 (7th Cir. 1982).

In short, this case is on all fours with *Beck* and should be decided under *Beck*. There were only two issues in this trial--whether the "penetration" necessary for first degree attempted or actual sexual assault occurred, *see* Neb. Rev. Stat. § 28-318(6)(Reissue 1989)[4], and whether Reeves was intoxicated to the point of being unable to form the requisite specific intent to commit the attempted or actual sexual assault. *See State v. Reynolds*, 235 Neb. 662, 665, 457 N.W.2d 405, 406 (Neb. 1990), *citing* William LaFave & Alan Scott, *Substantive Criminal Law* § 4.10 at 551, 554 (West 1986). These issues, both implicating the state's burden of proof, were placed before the jury, *see* J.A. at 12-25, but the jury was afforded no avenue to find what the evidence showed: that Reeves had killed his victims but that he had been so intoxicated that he either could not have accomplished the physical act of attempting to or succeeding in penetrating his first victim or could not have formulated the specific intent to commit sexual assault.

That the jury did in fact convict Reeves of felony murder rather than acquit him is the more likely because Reeves admitted facts sufficient to find that he had committed the homicides yet the evidence of a sexual penetration of

---

[4]The crime of sexual assault in the first degree differs from the crime of sexual assault in the second degree in the additional element of penetration. *State v. Tamburano*, 201 Neb. 703, 704, 271 N.W. 2d 472, 473.

Janet Mesner was not overwhelming[5] while Reeves' condition, on the other hand, clearly indicated nearly senseless intoxication.[6] *See Villafuerte v. Lewis*, 75 F.3d 1330, 1338 (9th Cir. 1996)(even though Arizona law recognized no lesser included offense of felony murder/kidnaping, where there was sufficient evidence to support defense of intoxication, it was "essential" that a lesser included offense of the underlying felony be given i.e. unlawful imprisonment); *cf. Clabourne v. Lewis*, 64 F.3d 1373 (9th Cir. 1995)(no *Beck* violation where the evidence of intoxication was minimal and would not have warranted a lesser included instruction under state law).

Indeed, this case presents an even greater risk of an unreliable verdict than that presented in *Beck*. Beck admitted that he had robbed his victim but denied that he had killed him or intended to kill him. Because the evidence tended to support this defense, the Alabama prohibition against convicting on anything less than intentional murder operated

---

[5]The secretions in her vagina were determined to be merely *consistent* with intercourse having occurred; there was no evidence of semen anywhere, for example, or signs of forced penetration.

[6] That Reeves was intoxicated to the point of insensibility is overwhelmingly supported by evidence of his having left his wallet and clothing at the scene and of his wandering half-naked in the streets in forty degree weather following the commission of two brutal murders.

to create deep division among the jurors and therefore a great likelihood that the verdict was in reality compromised. In this case, Reeves admitted sufficient facts as to the killings but contested his capacity to form the intent to commit the underlying felony. Because of the gruesome, inflammatory, and overwhelming evidence of Reeves' participation in the killings, the Nebraska prohibition against consideration of non-capital homicide likely licensed a wholesale jury stampede to convict on the basis of the killings, rather than a thoughtful sifting of the subtle but legally determinative nuances of felony murder *mens rea* theory. Whereas the *Beck* jury was likely divided and the verdict compromised, the *Reeves* jury was surely *wholly mistaken*. *Cf. Gerlaugh v. Stewart*, 1997 WL 680072 (9th Cir. November 7, 1997)(Where evidence of intoxication was extremely weak and the evidence of intent to kill, rob, and kidnap was overwhelming, Arizona trial judge's refusal under Arizona law to give a lesser included instruction of capital felony murder had no substantial or injurious effect on the verdict).

B. The Nebraska Supreme Court has not understood *Reeves v. Hopkins* to require a revision of its capital murder statute or Nebraska judges to give lesser included instructions where the law does not so permit. Rather, Nebraska has understood *Reeves v. Hopkins* to require the state to justify its prohibition on some constitutional basis and has restricted *Reeves* to capital cases.

In *State v. Price*, 252 Neb. 365, 562 N.W. 2d 340 (1997), the Nebraska Supreme Court refused to apply *Reeves* in a case where the defendant was not ultimately sentenced to

death. The court characterized the holding in *Reeves* thus:

> *Reeves* found nothing "necessarily unconstitutional" with the definition of mental culpability required in Nebraska for a felony murder conviction [citation omitted]. However, the Eighth Circuit concluded that "the State may not, consistent with the Constitution, bar an instruction on noncapital homicide, in a felony murder case where the death sentence is imposed, on the basis that felony murder requires no showing of intent or, at least, a reckless indifference to the value of human life".

Id. at 252 Neb. at 372, 562 N.W. 2d at 346. The Nebraska Supreme Court thus clearly does not read *Reeves* to mean that its capital felony murder statute is unconstitutionally defective.

Nor does the Nebraska Supreme Court read *Reeves* to require Nebraska trial judges to administer lesser included instructions where Nebraska's capital felony murder statute and caselaw would not permit it. Rather, it understands *Reeves* to preclude the state from *justifying* its capital felony murder statute on the unconstitutional basis that it requires no showing of intent to kill or reckless indifference to human life. *See Enmund v. Florida*, 458 U.S. 782 (1982) *cited in Reeves*, 102 F.3d at 984-85. Nebraska may prosecute under its capital felony murder statute, thus risking running afoul of *Beck*, *but it must be able to justify its practice on some*

constitutional basis. *Cf. Spaziano* (that a jury would be "tricked" into believing that lesser included offenses were available when they were not was a constitutional basis to refuse to give lesser included instructions); *Hopper v. Evans*, 456 U.S. 605 (1982)(that there was insufficient evidence to support any lesser included instruction was a constitutional basis to refuse to give lesser included instructions). *See also Williams v. Armontrout*, 912 F.2d 924, 928 (8th Cir. 1990)(*en banc*)(*Beck* did not apply because the evidence would not have supported a conviction for the charge for which the defendant requested an instruction).

C. The Nebraska common law roots of its view that there are no lesser included offenses of felony murder reveal that it is not a *per se* rule. Both the State and the Solicitor General acknowledge that first degree sexual assault and involuntary manslaughter qualify as lesser included crimes under Nebraska law.

In reiterating that Nebraska has long held the view that there are no lesser included offenses of felony murder, the Nebraska Supreme Court in *State v. Reeves*, 216 Neb. 206, 216, 344 N.W.2d 433, 442 (1984)("*Reeves* I") cited three Nebraska cases--*State v. Hubbard*, 211 Neb. 531, 319 N.W.2d 116 (1982), *State v. Bradley*, 210 Neb. 882, 317 N.W. 2d 99 (1982) and *State v. Montgomery*, 191 Neb. 470, 215 N.W. 2d 881 (1974). None are capital cases and do not therefore implicate the Eighth Amendment considerations that prompted this Court to decide *Beck*. *Montgomery*, the earliest case, upheld the trial court's refusal to give a second degree murder or manslaughter instruction in a felony murder

prosecution. But the court stated:

> This is not to say, of course, there might not occur a set of facts under which an instruction on the lesser offense of second degree murder or manslaughter might not be appropriate. Such a situation might be under circumstances where there is a time lag between an assault clearly complete which results in death and the robbery, and where the evidence justifies the conclusion that the robbery indeed was an afterthought and the assault itself was not the direct means of perpetrating the robbery.

Id., 191 Neb. at 473, 215 N.W. 2d at 883 (1974). The rule in Nebraska is that felony murder "*ordinarily*" admits of no lesser included offenses.

First degree sexual assault qualifies as a lesser included offense of capital felony murder-sexual assault under the Nebraska (and federal) "elements" test. *See State v. Williams*, 503 N.W.2d 561, 565 (Neb. 1993)(overruling a line of decisions adopting the "cognate-evidence" test); *Schmuck v. United States*, 489 U.S. 705, 716 (1989)(adopting the "elements" test). *Indeed, both the State and the Solicitor General in their briefs before this Court acknowledge as much. See* Pet. Br. at 32 n. 28; *Amicus* Br. for the United States at 19 n. 13, *citing State v. Nissen*, 560 N.W.2d 157, 178-79 (Neb. 1997)(burglary is a lesser-included offense of felony murder-burglary); *Schmuck*, 489 U.S. at 718 (under the test used in federal courts for determining which offenses are

"necessarily included" within the meaning of Fed. R. Crim. P. 31(c), predicate felonies are lesser-included offenses of felony murder). The felony murder prohibition at issue in this case thus violates Nebraska's own law of lesser included crimes.

Moreover, as the Solicitor General acknowledges, while Nebraska has not specifically addressed whether "unlawful act" manslaughter is also a lesser included offense of felony murder-sexual assault, *see Amicus* Br. for the United States at 13-14 n. 8, the Solicitor General rightly concedes that "unlawful act" manslaughter meets the Nebraska (and federal) "elements" test because a defendant who committed felony murder necessarily would have caused death while in the commission of some unlawful act. *Id.* at 21 n. 15.

D. Whether this case presents this Court with a mandatory state prohibition against instructing on a lesser included crime that did exist under federal and Nebraska law or whether it presents this Court with a blanket state prohibition, *Beck* requires reversal.

Reeves was thus entitled to an instruction on *some* offense short of one calling for his death, even if not fully faithful to his theory of defense, *see Shad v. Arizona*, 501 U.S. 624 (1991). If Nebraska prohibits a lesser included instruction, Reeves was entitled to reversal of his conviction as unconstitutionally unreliable under the Eighth Amendment. Since Nebraska law did not permit an instruction on second degree murder, *see State v. Price*, 252 Neb. 365, 562 N.W. 2d

340, 346 (1997), and since Reeves' confession to the facts underlying the homicides precluded an instruction on first degree sexual assault, *see State v. Huebner*, 513 N.W.2d 284, 292-93 (Neb. 1994)(jury should not be instructed as to lesser included offense unless "the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense"); *Keeble v. United States*, 412 U.S. 205 (1973)(evidence sufficient for a lesser included instruction must be such as to acquit of the greater offense and rationally find guilt as to the lesser), Reeves was entitled to have the jury instructed on "unlawful act" involuntary manslaughter.[7] *Cf. State v. Masters*, 246 Neb. 1018, 524 N.W.2d 342 (1994)(trial court was not required to consider lesser included offense of manslaughter in bench trial of defendant on charge of felony murder where the fact finder was not presented with the death penalty or acquit situation and defendant received sentence of life imprisonment). This theory, untested to date by Nebraska

---

[7]Neb. Rev. Stat. § 28-304. **Manslaughter; penalty**.

(1) A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act.

"Unlawful act" involuntary manslaughter does not require that the defendant have intended death to occur as a result of his unlawful act. *See* Neb. Rev. Stat. § 28-305(1)(1995).

under a *Beck* analysis, would permit the jury to believe both Reeves' intoxication defense (of which there was overwhelming evidence) and also believe that he had committed some unlawful act short of attempted or actual sexual penetration (of which the evidence was inconclusive). And, an instruction on involuntary manslaughter would present no obstacle to Nebraska's lesser included "elements" test, since it, like felony murder, contains no element of intent to kill. *See Reeves v. Hopkins*, 102 F.3d at 984; *State v. Rowe*, 210 Neb. 419, 315 N.W.2d 250 (1984)(difference between second degree murder and manslaughter is absence of malice).

Thus, this case either presents this Court with a mandatory state prohibition against instruction on a lesser included crime where a lesser included offense did exist and was supported by the evidence, or it presents this Court with a blanket state felony murder prohibition in a capital case that necessarily yielded an unreliable conviction under the Eighth Amendment. Either way, *Beck* governs and Reeves' sentence of death must be vacated.

E. The impact of an affirmance in this case on state law would be slight. Only three states, other than Nebraska and Arizona, incorporate felony murder into their capital statutes and have also held that some crimes are not lesser included offenses of felony murder.

Of the thirty-eight states that currently have death penalty statutes, only Illinois, Washington and Wyoming (other than the states at issue in this case) incorporate

common law felony murder into their capital murder statute and also hold that some other crimes are not lesser included offenses of felony murder.[8] In the other states, there is either no prohibition, *see, e.g.*, Cal. Penal Code § 190.3 (1988); *People v. Neely*, 6 Cal. 4th 877, 864 P.2d 460 (1993)(no substantial evidence warranting lesser included offenses of second degree murder or voluntary manslaughter); Ind. Stat.

---

[8]*See* Ill. Comp. Stat. Ann. ch. 720, § 5/9-1(1993); *People v. Harper*, 279 Ill. App.3d 801, 665 N.E.2d 474 (1996)(in felony murder case stemming from deaths of two people in arson fire, trial court properly refused to instruct on offense of involuntary manslaughter since intent was not element of charge of felony murder); Wash. Rev. Code Ann. § 9A.32.030 (1988); *State v. Dennison*, 115 Wash. 2d 609, 801 P.2d 193 (Wash. 1990)(first and second degree manslaughter were not lesser included offenses of first degree felony-murder, since both require proof of specific mental elements that are not required to prove first degree felony murder); Wyo. Stat. Ann. § 6-2-101(1977); *Richmond v. State*, 554 P.2d 1217 (Wyo. 1976) (manslaughter is not an offense necessarily included in robbery and therefore is not a lesser included offense of the crime of felony murder); *Jansen v. State*, 892 P.2d 1131, 1139 (Wyo. 1990)("a bright line rule is appropriate in the context of felony murder, and the statutory definition does not logically permit the giving of any instruction on any lesser included offense with respect to felony murder ... .").

Ann. § 35-42-1-1 (1986); *Hopkins v. State*, 582 N.E.2d 345 (Ind. 1991)(felony murder defendant was not entitled to instructions on lesser included offenses of reckless homicide or criminal recklessness absent evidence that killing was an act of recklessness) or the issue has not arisen in the context of a capital case.

Thus, contrary to the dire predictions of the Petitioner, *see* Pet. Br. at 30-33, the Solicitor General, *see Amicus* Br. for United States at 22- 28, and the attorney general *Amici*, *see Amicus* Br. for selected states' attorneys general at 13-19, an affirmance in this case would have little impact on the states' prerogative to fashion their own criminal jurisprudence. Yet an affirmance is mandated by *Beck*.

II.

DOES THE OPINION OF THE EIGHTH CIRCUIT IN *REEVES v. HOPKINS*, 102 F.3d 977 (8th CIR. 1996) CREATE A DIRECT CONFLICT WITH THE NINTH CIRCUIT IN *GREENAWALT v. RICKETTS*, 943 F.2d 1020 (9th CIR. 1991)?

A. There is no split between the Eighth and Ninth Circuits. The Ninth Circuit merely misapplied *Spaziano v. Florida*, 468 U.S. 447 (1984).

In *Greenawalt v. Ricketts*, 943 F.2d 1020, 1029 (9th Cir. 1991), the Ninth Circuit, in a two-paragraph discussion, held that since Arizona law recognized no lesser included

offenses to felony murder, this Court's holding in *Spaziano v. Florida*, 468 U.S. 447 (1984) foreclosed the defendant's *Beck* claim. In *Reeves v. Hopkins*, 102 F.3d 977, 983 (8th Cir. 1996), the Eighth Circuit held that *Spaziano* does not limit *Beck*, and that the Ninth Circuit had read *Spaziano* "too broadly".

In *Spaziano*, the defendant refused to waive the statute of limitations which prevented the trial judge from instructing on lesser included offenses of capital murder. In response to his later claim that jury's all-or-nothing choice between conviction and acquittal violated *Beck*, this Court held that a jury may not be instructed that it has a choice of crimes when any such choice is barred by state law. *Id.*, 468 U.S. at 456.

The *Reeves* court correctly understood *Spaziano* to be an exception to *Beck* rather than the logical extension represented by such post-*Beck* cases as *Hopper v. Evans*, 456 U.S. 605, 611 (1982)(holding that *Beck* requires instructions on noncapital offense only when the evidence would support a conviction on that charge) and *Enmund v. Florida*, 458 U.S. 782, 801(1982)(requiring that before a state may impose the death penalty, there must be a finding that the defendant was both a major participant in the killing and that he or she had acted with reckless indifference to human life). That exception would apply only when an instruction would mislead a jury into believing that it had a choice among offenses when it did not. *Reeves*, 102 F.3d at 984. Since Nebraska's refusal to recognize any lesser included offenses of felony murder operated in Nebraska's capital murder statute to confront a jury with the same all-or-nothing choice

proscribed by *Beck* --and not an affirmative misrepresentation of state law--the *Reeves* court found that *Spaziano* did not apply.

The *Greenawalt* court, by contrast, perfunctorily concluded that *Spaziano* held that whenever state law does not recognize any lesser included offenses of a capital crime, a defendant is not entitled to the "third option" required by *Beck*. *Greenawalt*, 943 F.2d at 1029.

B. This Court need only clarify that *Spaziano* is limited to cases of affirmative misrepresentation of state law and not to cases otherwise governed by *Beck* in which state law operates to proscribe instruction on lesser included offenses.

This Court need only clarify that *Beck* was not concerned with any of a variety of possible ***causes*** of a jury dilemma but rather with the likely ***effect*** of those causes on the integrity of the deliberative process. A trial judge may not mislead a jury that lesser included offenses exist when, for any number of reasons, they do not; but neither, under Beck, may state law operate to force an unconstitutional dilemma between conviction of a capital offense and acquittal.

III.

DID THE EIGHTH CIRCUIT IN *REEVES v. HOPKINS* ANNOUNCE A "NEW RULE" UNDER *TEAGUE v. LANE*, 489 U.S. 288 (1989)?

A. The State has waived any *Teague*[9] argument.

This Court has declined to date to entertain a *Teague* claim raised for the first time in a petition for writ of *certiorari*, *see Schiro v. Farley*, 510 U.S. 222 (1994); *see also Godinez v. Moran*, 509 U.S. 389, 393 n.8 (1993)(same). Rather, this Court has minimally required a party to raise a potential *Teague* bar at whatever stage in the federal habeas proceedings the party claiming the benefit of *Teague* was on notice that a "new" issue has been raised. *See Goeke v. Branch*, 514 U.S. 115 (1995)(where the state cited *Teague* in the district court but the petitioner raised a new ground for affirmance for the first time in the court of appeals, the state was held not to have waived its *Teague* objection to the new ground). All of the courts of appeals since *Schiro* have declined to address a *Teague* claim that was not raised in the district court. *See, e.g.*, *Wilmer v. Johnson*, 30 F.3d 451, 455

---

[9]*See Teague v. Lane*, 489 U.S. 288 (1989)(holding that federal habeas corpus is not available to state prisoners who want to assert rights that they could not have asserted in their criminal proceedings in state court because the rights had not yet been declared.)

(3d Cir. 1994); *Duckett v. Godinez*, 67 F.3d 734, 746 n. 6 (9th Cir. 1995).

While it is possible to interpret *Goeke* three ways--a *Teague* claim is sufficiently preserved if raised for the first time in the court of appeals; or if raised at the time a "new rule" is sought; or if raised for the first time on appeal if first presented to the district court with respect to some issue, *see Eaglin v. Welborn*, 57 F.3d 496, 498 (7th Cir. 1995)--*none* of these interpretations would countenance the state's dereliction in this case. There was no lack of opportunity to raise a *Teague* objection: Reeves raised the *Beck* issue at every stage of both his state and federal proceedings. Moreover, the need for flexibility regarding possible waiver in cases involving considerations of comity, *see, e.g.*, *Granberry v. Greer*, 481 U.S. 129, 134 (1987); *Schlesinger v. Councilman*, 420 U.S. 738 (1975); *Younger v. Harris*, 401 U.S. 37, 40-41 (1971), is absent in this case since the Nebraska Supreme Court was twice invited to address the *Beck* issue and declined to do so. *See* Pet. Br. at 39 n. 36.

Finally, this Court and the lower courts have consistently held, following *Teague*, that the burden of asserting nonretroactivity belongs to the state and not to the federal courts *sua sponte*. *See, e.g., Casper v. Bohlen*, 510 U.S. 383 (1994)("We have recognized that the nonretroactivity doctrine is not 'jurisdictional' in the sense that [federal courts] ... must raise and decide the issue *sua sponte*" and " a federal court may, but need not, decline to apply *Teague* if the State does not argue it" (quoting *Collins v. Youngblood*, 497 U.S. 37, 41 (1990)); *Myers v. Collins*, 8

F.3d 249, 252 n. 7 (5th Cir. 1992)(although "it could be argued that the holding announced today is a 'new rule' and ... barred ... by *Teague v. Lane*" state waived nonjurisdictional *Teague* defense by failing to raise issue); *Epperly v. Booker*, 997 F.2d 1, 9 n. 7 (4th Cir. 1993)(state waived *Teague* defense be failing to raise it in district court and raising it for first time on appeal). *See generally* James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* § 25.3 (2d ed. 1988).

B. The Eighth Circuit in *Reeves v. Hopkins* did not create a "new" rule; rather, it merely applied *Beck* and its progeny to a case on all fours with *Beck*.

While this Court has invited the parties in this case to address the due process question of whether *Beck* requires a state to instruct on a lesser included offense where state law appears to forbid such an instruction, *Amicus* has argued in part II of this brief that this Court may and should resolve this case without creating a "new" rule itself. Inevitably, however, whether this Court determines that it must create new law in this case depends upon its reading of the Eighth Circuit's holding in *Reeves* and whether a "new" rule was established therein.

There are two reasons why the Eighth Circuit did not create a "new" rule in *Reeves*. First, the Eighth Circuit held only that the Nebraska felony murder prohibition could not be applied in a capital case. *See id.*, 102 F.3d at 985. It did *not* hold that Nebraska's statute was unconstitutional as offending due process, *see id.*, 102 F.3d at 984 ("We do not suggest that

the State may not impose the death penalty pursuant to a felony murder conviction. We mean to say only that the State's prohibition on instructions on noncapital charges in felony murder cases is inconsistent with *Beck*, and that its rationale for the prohibition would put *Beck* at odds with *Enmund*"), nor did it require, as the State and the Solicitor General urge, *see* Pet. Br. at 18, *Amicus* Br. for United States at 8-9, that Nebraska draft some new set of laws to conform to *Beck*. It merely applied precedent current as of the date Reeves' conviction became final[10] for the second time in a capital case.[11]

---

[10]There is no disagreement that this date was April 20, 1984.

[11]Although the courts of appeals have confronted *Beck* issues in approximately 108 cases since 1980, the vast majority were resolved upon with a finding that the evidence would not have supported the requested lesser included instruction. *See, e.g., Hatch v. State of Oklahoma*, 58 F.3d 1447 (10th Cir. 1995)(insufficient evidence of lesser included of first degree murder); *Williams v. Armontrout*, 912 F.2d 924 (8th Cir. 1990)(no separate kidnaping occurred, so no underlying felony was present to justify giving felony murder as a lesser included).

In only three cases to date have the courts of appeals confronted the problem of a state law prohibition on lesser included instructions where the evidence would have warranted them. All were non-capital cases. *See Jones v.*

Since *Teague v. Lane* was decided, this Court has defined a "new" rule of law in a variety of ways. *See Teague*, 489 U.S. at 301 (a rule is new if it "breaks new ground or imposes a new obligation on the States" or, put another way, was not "dictated by precedent existing at the time the defendant's conviction became final"); *Penry v. Lynaugh*, 492 U.S. 302, 315 (1989)(rule petitioner invoked was not new as petitioner was only asking "to fulfill the assurance" upon which earlier cases were based); *Butler v. McKellar*, 494 U.S. 407, 415 (1990)(rule was new when it was "susceptible to debate among reasonable minds"); *Saffle v. Parks*, 494 U.S. 484, 488 (1990)(task is to determine whether a state court considering claim at the time conviction became final "would have felt compelled by existing precedent to conclude that the rule" now invoked was required by the Constitution); *Stringer v. Black*, 503 U.S. 222, 237 (1992)(whether rule is dictated by precedent is an "objective" inquiry not to be governed by whether all lower courts agree). *See also Wright v. West*, 505 U.S. 277, 304 (1992)(O'Connor, J. concurring)(if a "proffered factual distinction between the case under consideration and pre-existing precedent does not change the force with which

---

Thigpen, 741 F.2d 805 (5th Cir. 1984)(reading *Spaziano* to limit the applicability of *Beck* to capital cases where state law establishes lesser included offenses); *Castillas v. Scully*, 769 F.2d 60 (2d Cir. 1985)(under New York law, criminal facilitation was not a lesser included of felony murder, so no instruction warranted); *Hill v. Kemp*, 833 F.2d 927 (11th Cir. 1987)(federal court must adhere to state law determination that statutory rape was not a lesser included of forcible rape).

the precedent's underlying principle applies, the distinction is not meaningful"; at 308 (Kennedy, J. concurring)(when the "rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule"). Affirming the Eighth Circuit's judgment does not depend upon choosing among any of these formulations, however, because the *Reeves* holding was not "new" under any of these formulations. The Eighth Circuit merely applied *Beck*, which was firmly in place at the time of Reeve's trial, to a state rule that, like the statute in *Beck*, flatly prohibits instructing a jury on lesser included offenses in capital cases.

Second, and more broadly, the purportedly "new" rule in this case was announced on appeal as a resolution of Reeves' *own* habeas action. This is not a case, like all other post-*Teague* cases, in which a habeas petitioner seeks to rely on some decision of this Court decided after his or her conviction became final. *See, e.g., O'Dell v. Netherland*, 117 S. Ct. 1996 (1997)(rule in *Simmons v. South Carolina* requiring that a capital defendant be permitted to inform the sentencing jury of his parole-ineligibility if the prosecution argues future dangerousness was "new"); *Lambrix v. Singletary*, 117 S. Ct. 1517 (1997)(rule in *Espinosa v. Florida* was "new" and could not be retroactively applied). Not surprisingly, this Court has concluded in such cases that the intervening Supreme Court decision was a "new" rule which the Court refused to apply retroactively. Nor is this a case, like *Gilmore v. Taylor*, 508 U.S. 333 (1993), in which a habeas petitioner seeks to take advantage of a favorable

decision *in another case in his own circuit* decided after his conviction has become final, for the *Teague* doctrine generally seems to operate to preempt *stare decisis* in habeas cases. Rather, Reeves seeks the benefit of the resolution of his own habeas petition as to which the Eighth Circuit's opinion is binding precedent. While this Court may not approve of that precedent, the vehicle for registering that disapproval is not *Teague* but rather the granting of a petition for writ of *certiorari* on grounds specified in S. Ct. R. 10.

Thus, because the state has waived its *Teague* objection by not raising it in the district court; because the Eighth Circuit was acting merely as a lower court applying established precedent of this Court to an set of facts nearly identical with those presented in *Beck;* and because that precedent is binding in Reeves' habeas case unless this Court reverses the holding on the merits, *Teague* does not apply.

CONCLUSION

Based upon the arguments and citations of authority of the respondent and the *amicus*, it is respectfully requested that this Court affirm the Eighth Circuit's decision in *Reeves v. Hopkins*, 102 F.3d 977 (8th Cir. 1996).

Respectfully submitted,

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,
Amicus Curiae
DAVID PORTER, CO-CHAIR

HELEN C. TRAINOR, ESQ.
Counsel of Record
150 West Flagler Street, Suite 1500
Miami, Florida 33130
Telephone: (305) 536-6900 ext. 208
Miami, Florida
December, 1997

No. 96-1693

In The

Supreme Court of the United States

October Term, 1997

FRANK X. HOPKINS, WARDEN,

Petitioner,

v.

RANDOLPH K. REEVES

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AFTER ARGUMENT

PAULA B. HUTCHINSON
Appointed by this Court
HUTCHINSON AND GOVAERTS
5815 South 58th Street
Suite C3
Lincoln, Nebraska 68516
(402) 420-2156

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

No. 96-1693

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1996

FRANK X. HOPKINS,
Petitioner,

v.

RANDOLPH K. REEVES,
Respondent.

MOTION FOR LEAVE TO PRESENT ADDITIONAL AUTHORITY

COMES NOW THE RESPONDENT, Randolph K. Reeves, by and through his counsel, and moves this Court for leave pursuant to S. Ct. Rule 25.6 to present additional authority to the Court. In support of his motion, Respondent states as follows:

1. The parties presented argument in this case on February 23, 1998.

2. The Supreme Court of Nebraska, on Friday, May 8, 1998, announced its opinion in *State v. White*, No. S-96-984 (Neb. May 8, 1998).

3. Respondent's counsel holds a good-faith belief that the *White* opinion is directly relevant to this case and its review would be useful to the Court in its determination herein.

4. The text of the *White* opinion is attached hereto.

WHEREFORE, the Respondent prays that this Court consider the *White* opinion in addition to the authorities previously cited to the Court in his response herein.

Respectfully submitted,
Randolph K. Reeves,
Respondent

BY: /s/ Paula B. Hutchinson
Paula B. Hutchinson
Counsel of Record
5815 South 58th Street,
Suite C3
Lincoln, NE 68516
(402) 420-2156

OPINION OF THE SUPREME COURT OF NEBRASKA

Case Title

State of Nebraska, Appellee,

v.

Calvin J. White, Appellant.

Case Caption

State v. White

Filed May 8, 1998, No. S-96-984.

Appeal from the District Court for Fillmore County: Orville L. Coady, Judge. Reversed and remanded for further proceedings.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, and STEPHAN, JJ., and FAHRNBRUCH, J., Retired.

GERRARD, J.

This case presents the question of whether, upon retrial after reversal of a second degree murder conviction, the State is barred by the Double Jeopardy Clause from reprosecuting Calvin J. White for the crime of first degree felony murder after White had originally been charged with, and tried for, first degree premeditated murder but convicted by a jury of second degree murder. Because we conclude that White was impliedly acquitted of first degree premeditated murder at his first trial and the Double Jeopardy Clause bars the State from prosecuting White for felony murder at a subsequent trial, we reverse, and remand.

BACKGROUND

On January 27, 1992, White was originally charged with first degree premeditated murder, use of a firearm to commit a felony, theft of an automobile, and other crimes unrelated to this appeal, in connection with the December 27, 1991, shooting death of Patricia Cool. White was tried for these crimes in July 1992, and the jury was also instructed with respect to the lesser-included offense of second degree murder. The jury returned a verdict finding White guilty of second degree murder, use of a firearm to commit the murder, and theft of an automobile, and judgment was entered thereon.

Having had his convictions for second degree murder, use of a firearm to commit the murder, and theft of an automobile affirmed on direct appeal in *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993) (*White I*) White subsequently filed a motion for postconviction relief which was denied in the district court. On February 16, 1996, this court reversed the district court's denial of postconviction relief on the conviction for second degree murder and use of a firearm to commit the murder because the jury was not instructed that malice is an element of second degree murder, as required by *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994), and the cause was remanded for a new trial. *State v. White*, 249 Neb. 381, 543 N.W.2d 725 (1996) (*White II*). The conclusion *of White II* stated that the cause was remanded "for a new trial on the second degree murder and use of a firearm charges in accordance with this opinion." *Id.* at 390, 543 N.W.2d at 731. The mandate of this court simply stated that the judgment was "reversed and remanded for a new trial."

After the cause was remanded for a new trial, the State, in an amended information, charged White with (1) felony murder, (2) second degree murder, (3) use of a firearm to commit a felony, and (4) being a habitual criminal. White, in an amended plea in bar, claimed that because he was impliedly acquitted of first degree premeditated murder by virtue of being found guilty of second degree murder, he was being placed in jeopardy twice for the same crime when the State filed a felony murder charge against him in a subsequent proceeding. White also asserted in the amended plea in bar that the amended information charging him with felony murder violated this court's mandate in *White II* in that the mandate directed the district court to retry White for the crime of second degree murder. The district court overruled White's amended plea in bar, and White appeals.

ASSIGNMENTS OF ERROR

Restated, White asserts that the district court erred in overruling the amended plea in bar because the State's amended information charging him with felony murder violates (1) this court's mandate in *White II* in that the mandate directed the district court to retry White for the crime of second degree murder and (2) the Double Jeopardy Clauses of the Fifth Amendment to the U.S. Constitution and article 1, § 12, of the Nebraska Constitution. White also contends that the district court violated his right to due process under the 14th Amendment to the U.S. Constitution and article 1, § 3, of the Nebraska Constitution by overruling the amended plea in bar.

STANDARD OF REVIEW

An issue presented regarding a denial of a plea in bar is a question of law. *State v. Belmarez, ante* p. 467, ___ N.W.2d ___ (1998); *State v. Marshall*, 253 Neb. 676, 573 N.W.2d 406 (1998). Regarding questions of law, an appellate court is obligated to reach a conclusion independent of determinations reached by the trial court. *State v. Marshall, supra.*

ANALYSIS

Although it is the second assignment of error, we will first discuss White's double jeopardy claim because it is the dispositive issue in this appeal. The 5th Amendment to the U.S. Constitution, which is made applicable to the states through the 14th Amendment, provides in part: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." Neb. Const. art. 1, § 12, provides: "No person shall . . . be twice put in jeopardy for the same offense." The Double Jeopardy Clause of the Fifth Amendment protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *State v. Howell, ante* p. 247, ___ N.W.2d ___ (1998). This court has not construed Nebraska's double jeopardy clause to provide any greater protections than those guaranteed by the U.S. Constitution. *Id.*

White asserts that if the State is allowed to go forward with its felony murder charge, he will be subjected

to a second prosecution for the same offense after acquittal. Initially, we must determine whether White was actually acquitted of first degree premeditated murder at his first trial.

The U.S. Supreme Court specifically addressed this question in *Green v. United States*, 355 U.S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957). In *Green v. United States*, the defendant was charged with arson and first degree felony murder. At trial, the jury was authorized to find Green guilty of arson and either first degree felony murder or, alternatively, second degree murder, i.e., killing with malice aforethought. The jury found Green guilty of arson and second degree murder; however, the second degree murder conviction was reversed on appeal. Green was then tried again for felony murder and was convicted. On appeal, the Supreme Court was presented with the issue of whether the conviction for felony murder at the second trial constituted a double jeopardy violation. The Court recognized that at the first trial the jury was dismissed without rendering an express verdict on the first degree murder charge, but that the jury had been given a full opportunity to return its verdict. The Court concluded, therefore, that the situation was no different than if the jury had expressly rendered a "not guilty" verdict on the felony murder charge and that the Double Jeopardy Clause should have prevented the State from retrying Green on that charge at the second trial.

We are presented with a directly analogous situation in the instant case. At White's July 1992 trial, the jury was instructed on the crimes of first degree premeditated murder and the lesser-included offense of second degree murder. The jury returned a verdict finding White guilty

of second degree murder. Because the jury was given a full opportunity to return a verdict in this case, the conviction of second degree murder and silence with respect to first degree premeditated murder constitute at least an implied acquittal of the latter charge. White cannot be tried again for first degree premeditated murder.

The more difficult question that arises is whether first degree premeditated murder is the "same offense" as felony murder for purposes of determining whether White's implied acquittal of premeditated murder will bar the subsequent prosecution for felony murder. The State contends that premeditated murder and felony murder are not the same offense because each contains an element not contained in the other. In making this contention, the State urges us to apply the same-elements test from *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). In accordance with the Blockburger test, if each offense contains an element that is not contained in the other, they are not the same offense and there is no double jeopardy bar to a successive prosecution. *United States v. Dixon*, 509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993). There can be no dispute that premeditated murder and felony murder do not contain the same "elements" to support a conviction for first degree murder. Premeditated murder requires a purposeful killing and premeditated and deliberate malice, *State v. Marks*, 248 Neb. 592, 537 N.W.2d 339 (1995), none of which are required for felony murder, *State v. Hubbard*, 211 Neb. 531, 319 N.W.2d 116 (1982). The very basis of felony murder is the underlying felonious act or attempted felonious act that results in a killing, *State v. Bradley*, 210 Neb. 882, 317 N.W.2d 99 (1982), which is not

required for premeditated murder. Additionally, felony murder requires an intent to commit a felony, whereas premeditated murder does not. *State v. Brunzo*, 248 Neb. 176, 532 N.W.2d 296 (1995) (felony murder requires intent to commit felony; premeditated murder requires intent to kill).

However, we reject the *Blockburger* test as the controlling principle in this case for two reasons. First, *Blockburger* is an acceptable test in resolving the issue of whether a lesser offense is merged into a greater offense by reason of identity of elements. In *Brown v. Ohio*, 432 U.S. 161, 168, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977), the Supreme Court stated that "[t]he greater offense is . . . by definition the 'same' for purposes of double jeopardy as any lesser offense included in it." The Court added that "the sequence [of the greater and lesser offenses] is immaterial." *Id.* However, the Supreme Court has never applied the *Blockburger test* in a case where the accused has been charged with committing the same crime in alternative ways, e.g., first degree premeditated murder and first degree felony murder.

Second, the *Blockburger* test is deemed by the Supreme Court to be only a rule of statutory construction. *Missouri v. Hunter*, 459 U.S. 359, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983). The central focus of double jeopardy analysis is the determination of legislative intent.

[T]he Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors. The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose

more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial.

Brown v. Ohio, 432 U.S. at 165. See, also, *Sanabria v. United States*, 437 U.S. 54, 98 S. Ct. 2170, 57 L. Ed. 2d 43 (1978). If the legislature intends to create two separate offenses and allow punishment for both, then it has the power to do so. It is the legislature, and not the prosecution, which establishes and defines offenses. See *id.*

"The assumption underlying the *Blockburger* rule is that [the legislature] ordinarily does not intend to punish the same offense under two different statutes." *Ball v. United States*, 470 U.S. 856, 861, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985). In this case, we are not comparing two different statutes; premeditated murder and felony murder are both defined in the same statute, Neb. Rev. Stat. § 28-303 (Reissue 1995). In determining whether successive prosecutions violate the Double Jeopardy Clause when there has been a single violation of a single statute, the U.S. Supreme Court has expressly declined to apply the *Blockburger* test. *Sanabria v. United States, supra.*

Likewise, in considering whether dual convictions and sentences for first degree murder for one killing amounted to double jeopardy, the Supreme Court of Colorado declined to apply the *Blockburger* test. *People v. Lowe*, 660 P.2d 1261 (Colo. 1983). The Colorado court used two methods in determining that the dual convictions and sentences could not stand. First, " '[t]he Due Process Clause of the Fourteenth Amendment . . . would presumably prohibit state courts from depriving persons of liberty or property as punishment for criminal conduct

except to the extent authorized by state law." ' (Emphasis supplied.) *Id.* at 1267 (quoting *Whalen v. United States*, 445 U.S. 684, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980)). Next, to determine whether state law authorized the dual convictions and sentences, the court applied rules of statutory construction:

> [T]he [U.S.] Supreme Court has adopted the rule of lenity as a too[of statutory construction. . . . The rule requires that courts resolve ambiguities in a penal code in the defendant's favor. . . . The rule of lenity is a corollary of the rule of statutory construction that requires penal statutes to be construed against the government. . . . The rule of lenity applies not only to interpretations of the substantive prohibitions, but also to the penalties they impose.
>
> . . .
>
> We have likewise recognized the rule of lenity as a tool to be used in interpreting penal statutes. Colorado criminal statutes are to be strictly construed in favor of the accused.

(Citations omitted.) *People v. Lowe*, 660 P.2d at 1267-68.

The Colorado court then went on to examine the first degree murder statute to determine whether the statute created one offense or multiple offenses:

Section 18-3-102, C.R.S.1973 (1978 Repl.Vol. 8 & 1982 Supp.), provides:

> " . . . (1) A person commits the crime of murder in the first degree if:
>
> "(a) After deliberation and with the intent to cause the death of a person other than himself,

he causes the death of that person or of another person; or

"(b) Acting either alone or with one or more persons, he commits or attempts to commit arson, robbery, burglary, kidnapping, sexual assault in the first or second degree . . . and, in the course of or in furtherance of the crime that he is committing or attempting to commit, or of immediate flight therefrom, the death of a person, other than one of the participants, is caused by anyone; or

"(c) By perjury or subornation of perjury he procures the conviction and execution of any innocent person; or

" . . .

(3) Murder in the first degree is a class 1 felony."

People v. Lowe, 660 P.2d at 1268 n.8. The Colorado court held that premeditated murder and felony murder were separate theories of the offense of first degree murder. "Murder after deliberation and felony murder are not denominated by the [Colorado statute] as separate and independent offenses, but only ways in which criminal liability for first-degree murder may be charged and prosecuted." *People v. Lowe*, 660 P.2d at 1269. Because the Colorado legislature did not clearly express an intent to allow conviction of more than one kind of first degree murder where there was only one person killed, strict construction prohibited dual convictions and punishments, which would have amounted to multiple punishments for the same offense. *People v. Lowe, supra.*

Several other jurisdictions have also held that premeditated murder and felony murder are the same offense. See, e.g., *People v. Zeitler*, 183 Mich. App. 68, 454 N.W.2d 192 (1990) (multiple murder convictions for one killing violate constitutional guarantee against double jeopardy); *State v. Arnett*, 158 Ariz. 15, 760 P.2d 1064 (1988) (premeditated murder and felony murder are merely two forms of same crime: first degree murder); *Wooten-Bey v. State*, 308 Md. 534, 520 A.2d 1090 (1987), *cert. denied* 481 U.S. 1057, 107 S. Ct. 2199, 95 L. Ed. 2d 853 (although premeditated murder and felony murder do not have identical elements, generally for purposes of double jeopardy provisions against successive trials or multiple punishments, they are deemed same offense); *State v. Powell*, 34 Wash. App. 791, 664 P.2d 1 (1983) (state legislature intended to specify alternative means of committing single offense); *State v. McCowan*, 226 Kan. 752, 602 P.2d 1363 (1979), *cert. denied* 449 U.S. 844, 101 S. Ct. 127, 66 L. Ed. 2d 53 (1980) (first degree murder statute does not create two different offenses, merely two theories for proving same offense); *State v. Gilroy*, 199 N.W.2d 63 (Iowa 1972) (sentences for premeditated murder and for felony murder imposed as result of one homicide amounted to double punishment); *Gray v. State*, 463 P.2d 897, 911 (Alaska 1970) ("[a]lthough there are several ways of committing first degree murder, it is still only one crime; and only one sentence can be imposed"). But see, *People v. Wilson*, 43 Cal. App. 4th 839, 50 Cal. Rptr. 2d 883 (1996) (allowing retrial of defendant on premeditated murder theory after reversal of conviction for felony murder); *Chao v. State*, 604 A.2d 1351 (Del. 1992) (intentional

murder and felony murder are not same offense, therefore separate convictions and sentences are permissible).

Although *People v. Lowe*, 660 P.2d 1261 (Colo. 1983), and many of the cases cited from other jurisdictions involved multiple punishments for first degree murder imposed in one trial and the instant case involves successive prosecutions, the distinction is immaterial to our analysis. If two crimes are the same offense for purposes of barring consecutive sentences at a single trial, they necessarily will be the same for purposes of barring successive prosecutions. *Sanabria v. United States*, 437 U.S. 54, 98 S. Ct. 2170, 57 L. Ed. 2d 43 (1978). "Where the judge is forbidden to impose cumulative punishment for two crimes at the end of a single proceeding, the prosecutor is forbidden to strive for the same result in successive proceedings." *Brown v. Ohio*, 432 U.S. 161, 166, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977).

With the foregoing in mind, we set out to interpret Nebraska's first degree murder statute. Section 28-303 provides, in pertinent part:

> A person commits murder in the first degree if he kills another person (1) purposely and with deliberate and premeditated malice, or (2) in the perpetration of or attempt to perpetrate any sexual assault in the first degree, arson, robbery, kidnapping, hijacking of any public or private means of transportation, or burglary. . . .

We have consistently held that the general overriding principle of statutory construction as it relates to a penal statute is that the penal statute is to be strictly construed. *State v. Ewing*, 221 Neb. 462, 378 N.W.2d 158 (1985); *State v. Suhr*, 207 Neb. 553, 300 N.W.2d 25 (1980). A penal

statute is given a strict construction which is sensible and prevents injustice or an absurd consequence. *State v. Robbins*, 253 Neb. 146, 570 N.W.2d 185 (1997); *State v. Sundling*, 248 Neb. 732, 538 N.W.2d 749 (1995). Additionally, penal statutes are given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served. *State v. Robbins, supra; State v. Ryan*, 249 Neb. 218, 543 N.W.2d 128 (1996), *cert. denied* ___ U.S. ___, 117 S. Ct. 293, 136 L. Ed. 2d 213.

We have previously determined that premeditated murder and felony murder are two different methods of committing a single offense. That conclusion provided the basis for our holding that when a defendant is charged in the alternative with premeditated murder and felony murder, a jury need not be unanimous under which theory it convicts the defendant. *State v. Buckman*, 237 Neb. 936, 468 N.W.2d 589 (1991). In *State v. Buckman*, 237 Neb. at 942, 468 N.W.2d at 593, we concluded that it matters not if some jurors arrive at a guilty verdict based on proof of premeditation and some arrive at the same conclusion based on the commission of a felony by defendant. . . . Each juror need only be convinced beyond a reasonable doubt that defendant committed the crime of first degree murder as defined in our statute.

Similarly, in *State v. White*, 239 Neb. 554, 557, 477 N.W.2d 24, 25-26 (1991), we referred to *Schad v. Arizona*, 501 U.S. 624, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991), *rehearing denied* 501 U.S. 1277, 112 S. Ct. 28, 115 L. Ed. 2d 1109, and the conclusion in that case that there is "widespread acceptance of the two mental states [of premeditated and felony murder] as alternative means of

satisfying the mens rea element of the single crime of first degree murder."

In the case at bar, the evidence could establish that the single act of killing was committed both after deliberation and in the perpetration of one of the enumerated felonies in § 28-303. White was initially charged, in 1992, with first degree premeditated murder. After the cause was remanded for a new trial, the State now seeks to charge White with, inter alia, felony murder. The conduct prohibited by § 28-303 is first degree murder. Premeditated murder and felony murder are not denominated in Nebraska's statutes as separate and independent offenses, but only ways in which criminal liability for first degree murder may be charged and prosecuted. Therefore, the difference in the charges between the first trial and the retrial is a difference in the State's *theory* of how White committed the single offense of first degree murder.

The Legislature has not manifested any clear intent that a defendant could be convicted of more than one kind of first degree murder where there is but one victim. Our past construction of first degree murder as one offense capable of proof by several theories is sensible and serves the overarching penal goals of deterrence and retribution. To hold that premeditated murder and felony murder are separate offenses does not significantly further the goals of the statute because neither retribution nor deterrence would be served by imposing multiple death or life sentences for a single killing. We are guided by the rule that where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has

acquiesced in the court's determination of the Legislature's intent. *State v. Atkins*, 250 Neb. 315, 549 N.W.2d 159 (1996); *State v. Joubert*, 246 Neb. 287, 518 N.W.2d 887 (1994). Therefore, we hold that the crime of first degree murder, as defined in § 28-303, constitutes one offense even though there may be alternate theories by which criminal liability for first degree murder may be charged and prosecuted in Nebraska.

Consequently, we determine that when a defendant is impliedly acquitted at trial of the offense of first degree murder, the Double Jeopardy Clause bars the State from reprosecuting that defendant at a subsequent proceeding, under a different theory of criminal liability, for the offense of first degree murder. To hold otherwise would mean that in cases involving only one death, the State could potentially bring successive prosecutions for felony murder until the State eventually obtained a conviction or until it ran out of underlying felonies on which to base the felony murder charge. We agree with other courts that have made the observation that it would indeed be a strange system of justice that would permit two sentences to be imposed for the killing of one person. See, *People v. Lowe*, 660 P.2d 1261 (Colo. 1983); *Gray v. State*, 463 P.2d 897 (Alaska 1970). It would be no less strange to allow a prosecution for the same offense after an acquittal or conviction based on a different theory of criminal liability.

Our holding that the Double Jeopardy Clause bars the State from retrying White for the crime of first degree murder does not prevent the State from proceeding with a new trial on the vacated second degree murder conviction and the related charge of use of a firearm to commit

a felony. Reversal for trial error, such as incorrect jury instructions and ineffective assistance of counsel, implies nothing with respect to the guilt or innocence of White. Rather, it is only a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect. *State v. Williams*, 247 Neb. 931, 531 N.W.2d 222 (1995), *cert. denied* 516 U.S. 1008, 116 S. Ct. 563, 133 L. Ed. 2d 488. Reversal based upon trial error does not bar a retrial of a criminal defendant. *Id.*; *State v. Yelli*, 247 Neb. 785, 530 N.W.2d 250 (1995), *cert. denied* 516 U.S. 915, 116 S. Ct. 304, 133 L. Ed. 2d 209. As a result of our holding, we do not consider White's other assignments of error.

CONCLUSION

For the foregoing reasons, we conclude that the district court erred in overruling White's amended plea in bar. We, therefore, reverse the order of the district court and remand this cause to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

MCCORMACK, J., not participating.